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American Bar Association JOURNAL

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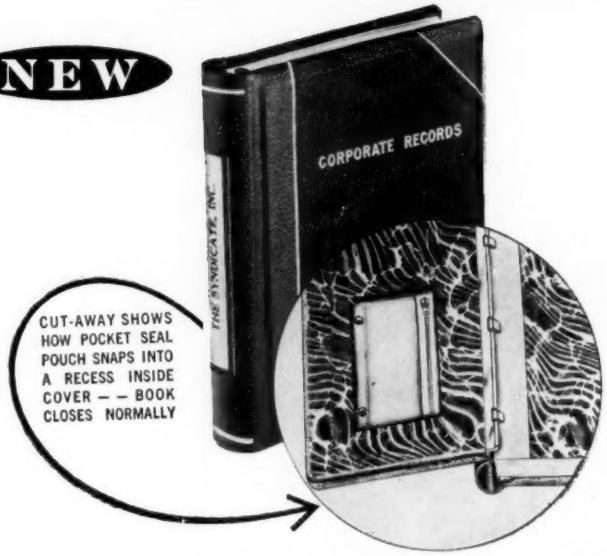

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January, 1961

VOLUME 47

No. 1

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American Bar Association JOURNAL

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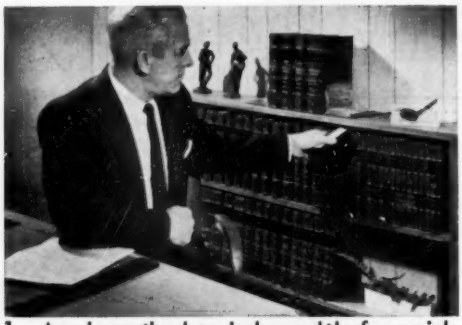

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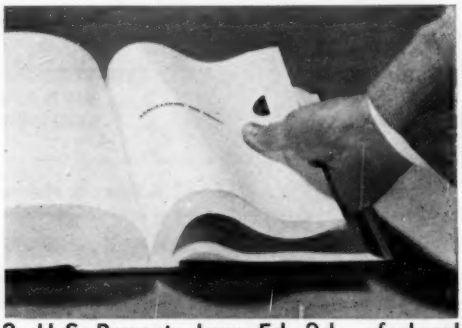

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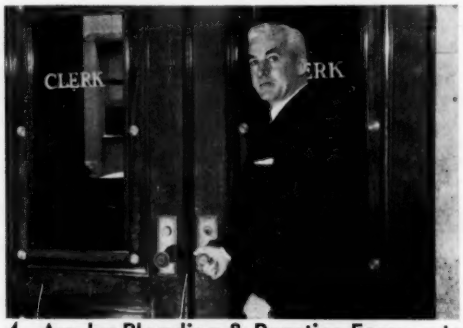

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The President's Page

Whitney North Seymour

In many parts of the United States, our courts need help, and the organized Bar, national, state and local, should do everything possible to see that they get it. While we continue to pursue many other objectives such as continuing legal education, legal aid, spread of the rule of law, in the end our prime responsibility is to see that the machinery of justice operates as fairly and smoothly as possible. Whether we are judges or practicing lawyers, this is our first task. But it is not ours alone; it is one we discharge in the public interest. When we encounter obstacles, as we often do, we should get the public to understand the problems and help us solve them. There are many things that judges and lawyers cannot accomplish alone; the public must also put its shoulder to the wheel and we should encourage it to do so.

The most pressing of these problems and the easiest to solve is the provision of extra judges needed in the federal courts. Here we have the most expert possible testimony as to the needs, based upon observation and study by those most directly involved. The Judicial Conference of the United States, composed of trial and appellate judges from each Circuit and presided over by the Chief Justice, has been concerned with the problem for years. It is aided by the well-qualified Administrative Office of the United States Courts. No action has been taken on the Conference recommendations for extra judges in the last five years. The need has grown. In some places, like the Southern District of New York, it is no exaggeration to say that the situation has become desperate. Congress should no longer defer action and all of us should do what we can to insure prompt action. There is little use in seeking to place blame for the past, but there should be no occasion for criticism of future inaction.

On a related matter, we should do all we can to see that delays in confirmation of qualified lawyers nominated as federal judges are eliminated. There have been a number of such delays in recent years even though the nominees had previously been found qualified by our Federal Judiciary Committee and its aid was available to the confirming authority. Delay in confirmation prejudices the courts where the new judges are badly needed, but it also prejudices the candidates and the prospects of getting highly qualified lawyers to accept appointment if they must stay for a long time in the twilight zone of the unconfirmed nominee.

In the states, too, our courts need help. In some states there are movements for modernizing the structure of the courts. Thus in New York a proposal for streamlining the courts in New York City seeks to modernize a structure which dates back more than a century. In other states there is a movement for improved methods of judicial selection. In still others the pressure is for a modern system of court administration so that judge-power can be efficiently mobilized to help where congestion is worst. In others there is need to modernize procedure or to provide the judges with other tools to help them administer justice more efficiently. All such plans in one way or another are intended to improve the administration of justice. In all these movements we should remember that fairness and deliberation must not be sacrificed to mere speed or statistical symmetry. Sometimes the natural conservatism of the Bench and Bar or the comfort of old ways prevents unanimous support, but usually the leaders of the Bench and Bar are in the forefront of such movements. The slowness of their progress is frequently due to lack of public understanding and support. Legislatures often have a way of turning a deaf ear to movements for judicial reform when their spokesmen are entirely in the profession. Thus it behooves us to have the leaders in other aspects of community life—business, education, church, social work and the others who have an understanding of the importance of the true administration of justice—link arms with the lawyers. When that is done, the courts will get the help they need.

In all these movements, it is important to be careful not to throw out the baby with the bath water. Reform is sought because we seek the ideal in the administration of justice. This implies no disrespect for current administration and no reflection on the great majority of our hard-working judges. They should not consider that they stultify themselves when they stand shoulder to shoulder with those who advocate needed reform. A learned, efficient and independent judiciary, supported and assisted by a trained and independent Bar, must always be our goal. Antiquities, structural or procedural, and excessive political influence in judicial selection are inimical to this great obligation. And we must strive to have the public understand and support our programs for here, again, we serve not our own interest but the public interest.

Views of Our Readers

■ **Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the *Journal* or otherwise, within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves to itself the right to select the communications or excerpts therefrom which it will publish and to reject others. The Board is not responsible for matters stated or views expressed in any communication.**

Agrees with President on Mr. Rhyne's Efforts

In "The President's Page" of the November, 1960, issue of the *Journal* it is stated:

> The Committee on World Peace Through Law, under the muscular leadership of former President Rhyne, is actively pushing its program for advancing the rule of law among nations...

The secret is out! Many will agree with President Seymour that Mr. Rhyne's efforts have been more *muscular* than otherwise.

FRANK E. HOLMAN

Seattle, Washington

Article on Criminal Code Was Inaccurate

The undersigned are members of the large advisory committee to Professor Herbert Wechsler and his staff who, for many years, have been formulating a modern Code of Criminal and Penal Law for the American Law Institute.

We have noticed with regret an article in your September, 1960, issue by Sol Rubin. Partly because this writer did not have before him the latest draft of the law, there are in his comment many inaccuracies and misinterpretations of its substance.

We doubt that Mr. Rubin is in a position to speak for the entire "Correctional Field" as he undertakes to do. A number of leading jurists and correctional authorities have assisted the reporter in evolving a draft which will, in spite of Mr. Rubin's animadversions, meet with their, and, we trust, general approval.

This note is to suggest that the Bar withhold any critical reaction to the Code until opportunity is given its author to reply in detail to the aforementioned criticism.

SANFORD BATES,
Pennington, New Jersey

JAMES V. BENNETT,
Washington, D. C.

CHARLES D. BREITEL,
New York, New York

RUSSELL G. OSWALD,
Albany, New York

JOSEPH SLOANE,
Philadelphia, Pennsylvania

Gremlin Rewordks "Rework" to "Reword"

In case Judge Waterman's review (November, 46 A.B.A.J. 1213) leads any of your readers to my *The Common Law Tradition: Deciding Appeals*, may I ask the courtesy of your columns to call attention to one unhappy typo? On page 401, in summarizing the facts with regard to "case law and statute, each", a gremlin got *reword* substituted for *rework*, with results at odds with the book's insistence on respect for the exact language of statutes. The passage reads:

> Now I have tried hard here—as I had in class—*not* to say that I admire as our Grand or classic Style of Reason any way of deciding that leaves even a Gibson or a Marshall free to decide "as he wants to." What I see around me, at work, and what I take pride in, is a way of deciding in which the materials of doctrine (case law and statute, each) contain, as part of themselves, along with words of command to courts, elements of reason and of purpose which vest in the appellate courts power and duty, within the flexible leeways, not only to work toward wisdom with the materials, but, again within flexible leeways, to rework the materials themselves into wiser and better tools for tomorrow's judging and better guides for tomorrow's counselor and law-consumer.

KARL N. LLEWELLYN

University of Chicago Law School
Chicago, Illinois

Marines Have Judiciary System, Too, Sir

I have read with interest the article in the November issue of the *Journal* by Colonel Frederick B. Wiener, U. S. Army Reserve, titled "The Army's Field Judiciary System: A Notable Advance". I believe the readers of the *Journal* would also be interested in an equally scholarly article on the same subject appearing in the August, 1960, issue of the *Journal of the American Judicature Society* entitled, "Judges in Uniform: An Independent Judiciary for the Army", by Major Robert M. Mummey, JAGC, U. S. Army, and Captain Thomas F. Meagher, Jr., JAGC, U. S. Army.

In addition, it appears that Colonel Wiener has overlooked the efforts of the Marine Corps in this field although he has referred to the Navy law officer program which is pending establishment at the present time.

The Commandant of the Marine Corps by his letter of May 27, 1960, to certain commanding generals directed that beginning September 15, 1960, general court-martial convening authorities of fourteen commands would utilize exclusively designated law officers who are stationed at the Marine Corps Bases at Camp Lejeune, North Carolina, and Camp Pendleton, California.

ROBERT A. SCHERR
Lieutenant Colonel,
U. S. Marine Corps

Headquarters, U. S. Marine Corps
Washington 25, D. C.

(Continued on page 10)

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American Bar Association Journal

the official organ of the American Bar Association

The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect, so far as possible, the objectives of the organized Bar of the United States.

There are eighteen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Family Law; Insurance, Negligence and Compensation Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral and Natural Resources Law; Municipal Law; Patent, Trademark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who has been duly admitted to the Bar of any state or territory of the United States and is of good moral character is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement and nomination by a member of the Association in good standing. All nominations made pursuant to these provisions are reported to the Board of Governors for election. The Board of Governors may make such investigation concerning the qualifications of an applicant as it shall deem necessary. Four negative votes in the Board of Governors prevent an applicant's election.

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Blank forms of proposal for membership may be obtained from the Association offices at 1155 East 60th Street, Chicago 37, Illinois. An application for membership should be accompanied by a check for dues in the appropriate amount as follows: $20.00 for lawyers first admitted to the Bar in 1955 or before; $10.00 for lawyers admitted in 1956, 1957 and 1958; and $5.00 for lawyers admitted in 1959 or later.

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■ **The *Journal* is glad to receive from its readers any manuscript, material or suggestions of items for publication. With our limited space, we can publish only a few of those submitted, but every article we receive is considered carefully by members of the Board of Editors. Articles in excess of 3000 words, including footnotes, cannot ordinarily be published.**

Manuscripts submitted must be typewritten originals (not carbon copies) and must be double or triple spaced, including footnotes and any quoted matter. The Board of Editors will be forced to return unread any manuscript that does not meet these requirements.

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Who Decides What "Internal Affairs" Means?

Some words, like "house" and "cow", have a fairly definite meaning but others do not. The word "democracy" does not mean the same thing in Russia that it means in America. If two whites kill a black in Alabama it is a lynching. If twenty blacks kill a white in Brooklyn it is juvenile delinquency. The World Court has no jurisdiction over the internal affairs of a member state. The statement of that fact sounds simple, but it has no meaning until some human being gives it a meaning in a particular case. France says that shooting Algerians is a purely internal affair of France. Russia says that shooting Hungarians is a purely internal affair of Russia.

The United States has adhered to the World Court, and the Connally Reservation says that the human beings who are to decide the meaning of internal affairs are we Americans and not those foreigners. All agree that no man should be a judge in his own case, and so the reservation is damned by calling it the self-judging reservation.

The situation would be very different if the charter of the court, in thirty or forty closely printed pages, defined the meaning of internal affairs. If that were attempted it would become obvious that no two nations could agree on what constituted internal affairs. At their last term the nine justices took forty or fifty pages to explain that they were unable to agree on the meaning of one of the simplest words in the language, the word "gift". They could not even make up their own minds.

The charter of the World Court is not a completed contract: one of its terms is not defined and is not definable. There has been no meeting of minds. It is as if A and B signed, sealed and delivered a written contract reading in full as follows: "A agrees to sell and B agrees to buy one modern ——— in perfect working order and condition for ——— dollars." Before we can go ahead, somebody has to fill in the blanks. According to the law of contracts the blanks would have to be filled in by mutual agreement of A and B. According to the Connally Reservation the blanks will have to be filled in by mutual agreement of the World Court and the United States.

Opponents of Connally say we ought to trust the judges of the World Court to make an honest interpretation of the charter. That is not the point. There is nothing for them to interpret, honestly or otherwise. They are not asked to interpret the meaning of a written charter; they are asked to write on a blank page. The Connally Reservation does not make us judges in our own case. Its effect is to recognize that the agreement is incomplete and that the only way to complete it is by mutual agreement. One contracting party ought not to be expected to give the other contracting party the sole right to fill in the blanks. The party who filled in the blanks would not be interpreting the contract; he would be making the contract. I am surprised that lawyers, in the name of law, should advocate such lawlessness.

RALPH T. CATTERALL
Richmond, Virginia

"Quick, Watson, the Cookbook"

It can be anticipated that the lead article in the October, 1960, issue of the *American Bar Association Journal* (Vol. 46, No. 10) "How Long Can the United States' Form of Democracy Last?" by Eustace Cullinan, of the San Francisco Bar, will be the subject of analysis by many qualified persons. Perhaps the comments of an ordinary country lawyer might furnish a fresh viewpoint.

Mr. Cullinan entertains the belief that the immediate method by which equality before the law can be preserved is by regulating labor unions in antitrust fashion, and soon. Undoubtedly he will have support for his views, but it is doubtful that he will find it among women, the press, or farmers.

Concerning women, he offers this friend-winning phrase: ". . . and, if we insist on counting women as people. . ." San Francisco gave the nation Mort Sahl straight from the Purple Onion, and it would seem that it is now bent on generating a few laughs from the Red Eyed Tomatoes.

Without mentioning what seems to be a slight trend in the direction of the

(Continued on page 12)

(Continued from page 10)

successful establishment of chain supermarkets, chain drug stores, chain banks and chain title companies, he suggests that newspapers under one control be restricted and regulated by law as trusts and monopolies. Mr. Cullinan indeed has a novel approach to the cultivation of lasting respect among the members of the Fourth Estate.

They get a pat on the head, however, for having exercised "good sense" on California initiatives.

The farmers, he says, should be given a clear perception that their bonus demands spell ruin to the country by way of inflation.

Feeling that the American rough and ready system is now threatened by special interests, namely labor organizations, Mr. Cullinan, reasoning that the control of trusts and large industrial concerns was in the public interest and therefore proper, arrives at the conclusion: "It is manifestly right to subject powerful labor organizations to similar restraints." There is no denying that Mr. Cullinan is of that opinion. Mr. Cullinan's proposed remedy is likewise the view of the National Association of Manufacturers (*New York Times* November 24, 1960), and that gregarious sports writer, W. Pegler.

In support of his plea that regulation of labor organizations should be accomplished without delay, he states that there is historical precedent for such action in the history of the merchant and craft guilds which were regulated in England in 1547 for creating political uprisings.

A widely respected English publication, 10 Encyclopaedia Brittanica 967, apparently disagrees:

> The craft fraternities were not suppressed by the statute of 1547 (I Edward VI). They were indeed expressly exempted from its general operation. Such portions of their revenues as were devoted to definite religious observances, were, however, appropriated by the Crown. The revenues confiscated were those used for "the finding, maintaining, or sustenance of any priest or of any anniversary or obit, lamp, light, or other such things". This has been aptly called "the disendowment of the religion of the misteries". Edward VI's statute marks no break in the continuity in the life of craft organizations. Even before the Reformation, signs of decay had already begun to appear and these multiplied in the 16th and 17th centuries. The old guild system was breaking down under the action of new economic forces. Its dissolution was due especially to the introduction of new industries organized on a more modern basis and to the extension of the domestic system of manufacture. Thus the companies lost control over the regulation of industry, though they still maintained their old monopoly in the 17th century and in many cases, even in the 18th. In fact, many craft fraternities still survived in the second half of the 18th century, but their usefulness had disappeared. The mediaeval form of association was incompatible with the new ideas of individual liberty and free competition, with the greater separation of capital and industry, employers and workmen and with the introduction of their own interests and disregarding the welfare of the community, the old companies had become an unmitigated evil. Attempts have been made to find in them the progenitors of the trade unions but there seems to be no immediate connection between the latter and the craft guilds. The privileges of the old fraternities were not abolished until 1835 and the

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substantial remains or spectral forms of some are still visible in other towns besides London.

It might be noted that with or without suppression, remedial legislation in England respecting dangerous trades and occupations, hours of labor and restriction of child labor has achieved what appears to be a common benefit throughout the civilized world.

Mr. Cullinan suggests that since order is the prime requisite of democracy, or any government, thoughtful Americans will do better to be concerned with the future and the menacing forces of destruction within, as well without, the walls. His premise that regulation of labor is required is based upon the thought that since the survival of democracy is dependent upon a means of maintaining equality before the law, regulation is the only method remaining of pulling labor back on an even line.

It is, of course, true that freedom of the individual is bounded by reasonable regulation for the welfare of the community. *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330. Acknowledging such subordination, it has been said that one of the greatest contributions of the English-speaking people to civilization is the protection by law of the private individual in the enjoyment of his property and his personal liberties against the demands and aggressions of the public. *Conger* v. *Pierce Company*, 116 Wash. 27.

In considering regulation of the rights of organized labor, remembrance should be had of the pronouncement of Chief Justice Marshall in *Fletcher* v. *Peck*, 6 Cranch 87, 3 L. ed. 162, that the guaranties found in the American Constitution were actually framed to shield the people and their property from the effects of strong and sudden passions.

Since the lawyer is a minister of the law (Canon 32), he should take a long look at any proposal which would harness a liberty or deprive people of property upon the expedite urging that such a course is necessary in the protection of the very liberty which is marked for suppression.

It is not enough to condemn labor because their reasoning differs. True it is that truth finds its own level. When Galileo insisted that the earth traveled around the sun, a proposition advanced by Copernicus, he unsuccessfully faced trial by Inquisition and the books of Copernicus were placed on the Index of prohibited books, where they remained for 200 years. It was both popular and accepted practice, in 1632, to condemn Copernicus. The story of Galileo is an excellent historical example of strong passions encompassed by an equally obnoxious companion, conformity.

It may be true that in some gatherings it is acceptable practice to condemn labor and by such method gain the mantle of approved, but limited, respectability. The true American viewpoint, however, was spelled out in the adoption of a novel theory of government, which bears a significant resemblance, in its treatment of the rights and importance of the individual, to the teachings of a man of Gallilee.

While not necessarily an exclusive dedication, much of Mr. Cullinan's argument could have been used by the speakers for the affirmative had there been a debate upon the subject: "There Shall Be No Tea Party in Boston Tonight".

There is a striking lack of similarity between the recipe offered by Mr. Cullinan and the cookbook prepared by the original group of chefs, in 1787 and 1791, entitled "The Constitution of the United States of America".

STANBERY FOSTER

Olympia, Washington

On International "Togetherness"

"Hands across the sea" was the delightful experience of the writer and family in a special way, as a sequel to the recent American Bar Association Convention at Washington.

We (my wife Frances and I) arrived at the Manger Hamilton late Sunday, August 28, and in the Coffee Room that same evening essayed to extend a friendly hand to an English couple attending the convention, solicitor Maurice J. O'Connor and his wife Barbara. They live at Mansfield, England, and expressed interest in Mans-

(Continued on page 16)

THE JOINT COMMITTEE ON CONTINUING LEGAL EDUCATION OF THE AMERICAN LAW INSTITUTE AND AMERICAN BAR ASSOCIATION

is pleased to announce a three-day

INSTITUTE SEMINAR

on

Legal Problems in the Use of Electronic Data Processing in Business, Industry and Law

TO BE HELD AT WASHINGTON, D. C.
ON MARCH 23, 24 AND 25, 1961

Matters to be discussed will include: The functions and operations of computers and their impact on tort, tax, corporation, contract, banking, sales, antitrust, patent and copyright law, as well as on the law of evidence and trial practice.

SINCE ATTENDANCE WILL BE LIMITED AT THIS SESSION, EARLY SUBSCRIPTION BY THOSE INTERESTED IS RECOMMENDED

Inquiries should be sent to:

THE DIRECTOR, JOINT COMMITTEE ON CONTINUING LEGAL EDUCATION
133 SOUTH THIRTY-SIXTH STREET
PHILADELPHIA 4, PENNA.

(Continued from page 14)

field, Ohio, an interest developed materially through an exchange of newspapers between the two cities. So intrigued were your good will ambassadors by these charming Britons that we simultaneously thought it would be not only gracious, but also very enjoyable to invite them to drive back home with us to Toledo, via Mansfield, and they accepted.

Being friendly is its own reward. Maurice and Barbara took us to the tea and reception at the British Embassy, Frances helped Barbara shop, etc. We departed from Washington early (Thursday) on account of the heat, and it was amazing how our luggage fitted into the trunk (or was it the boot?) of our new compact, which they said would be a middling good sized car in England. We made a leisurely two-day trip of it home, had the pleasure of showing our guests an ultra-modern motel over night, and are sure that they saw more of the States by following good U. S. and state highways than one could possibly do by traveling by plane, train or turnpike.

We had Maurice and Barbara at our home from Friday evening until Monday (Labor Day) evening. I had a difficult time over that holiday week end showing Maurice anything "professional" in regard to our courts and the local legal fraternity. Your reporter attempted to show Maurice the courthouse, and possibly to introduce him to a judge or two, Saturday morning. But we lost an hour somewhere and arrived at the courthouse about five minutes before twelve, to be greeted only by a janitor who told us we could have the place, but to be out in a few minutes or be locked in. . .

We feel that the O'Connors were quite happy to be our guests in a typical (we hope) American home, to see some of our public institutions, to tour minutely and leisurely a super-market (after hours—we know the manager), to shop at a large suburban shopping center.

Professional note—Two aspects, somewhat associated, of legal practice in England were quite interesting. There is no contingent fee basis for legal work used there, and legal aid is handled quite differently. A client, unable financially to pay a suitable retainer is referred by the solicitor to a society maintained by the profession. Upon determining the person's eligibility to assistance a certificate is issued guaranteeing payment of a reasonable attorney fee and costs to any solicitor whom the individual then employs. The individual may be required to make some small payment to the society pending a determination of his claim, or may pay nothing.

Maurice and Barbara were to return to England September 14, after further stops in Cleveland, New York City and Boston. Bless you and hurry back, dear friends.

M. GAIL LEACH

Toledo, Ohio

Nominating Petitions

Indiana

The undersigned hereby nominate Telford B. Orbison, of New Albany, for the office of State Delegate for and from Indiana to be elected in 1961 for a three-year term beginning at the adjournment of the 1961 Annual Meeting:

Benton E. Gates, Jr., of Columbia City;

Verne G. Cawley, of Elkhart;

William T. Fitzgerald, of Evansville;

James R. Newkirk and John D. Shoaff, of Fort Wayne;

Richard P. Tinkham, of Hammond;

Thomas M. Scanlon, Alvin E. Meyer, Merle H. Miller, David M. Lewis, Floyd W. Burns, Robert D. Coleman, Harold R. Woodard, C. B. Dutton, Charles C. Baker and John K. Ruckelshaus, of Indianapolis;

Albert Meranda, Homer D. Smith, Charles C. Fox and Owen Voigt, of Jeffersonville;

Albert L. Harker, of Marion;

Marshall E. Hanley, of Muncie;

Emerson J. Brunner and Warren M. Brown, of Shelbyville;

George N. Beamer, of South Bend.

Nevada

The undersigned hereby nominate John Shaw Field, of Reno, for the office of State Delegate for and from Nevada to be elected in 1961 for a three-year term beginning at the adjournment of the 1961 Annual Meeting:

Paul D. Laxalt and Milton B. Badt, of Carson City;

Taylor H. Wines, of Elko;

C. E. Horton and Jon R. Collins, of Ely;

John W. Diehl, of Fallon;

L. E. Blaisdell, of Hawthorne;

William P. Compton, Jack E. Butler, V. Gray Gubler, Madison B. Graves, Charles W. Deaner and Thomas A. Foley, of Las Vegas;

Llewellyn A. Young, of Lovelock;

A. L. Scott, of Pioche;

William J. Forman, Douglas Busey, Harold O. Taber, John C. Bartlett, John S. Halley, Bruce R. Thompson, Morgan Anglim and William K. Woodburn, of Reno;

William P. Beko, of Tonopah;

Merwyn H. Brown, of Winnemucca.

New Hampshire

The undersigned hereby nominate Robert W. Upton, of Concord, for the office of State Delegate for and from New Hampshire to be elected in 1961 for a three-year term beginning at the adjournment of the 1961 Annual Meeting:

Willoughby A. Colby, Frank J. Sulloway, James B. Godfrey, Guy A. Swenson, Jr., Franklin Hollis, Joseph S. Ransmeier, Jerome M. Leonard and Richard N. Pearson, of Concord;

Robert B. Donovan, of East Kingston;

John W. Perkins, of Exeter;

William Lehnert, of Groveton;

Homer S. Bradley, of Keene;

John E. Gormley, of Lancaster;

Robert P. Booth, Ralph E. Langdell, Winthrop Wadleigh, Robert L. Chiesa, Charles J. Dunn, Richard C. Kohls, Philip G. Peters and John J. Sheehan, of Manchester;

Robert E. Earley, Robert B. Hamblett, Joseph M. Kerrigan and David C. Hamblett, of Nashua.

Tennessee

The undersigned hereby nominate Weldon B. White, of Nashville, to fill the vacancy in the office of State Delegate for and from Tennessee:

Frank N. Bratton, of Athens;

W. D. Spears, W. Corry Smith and Jere T. Tipton, of Chattanooga;

W. M. Daniel, Jr., of Clarksville;

Sam Delk Kennedy, of Columbia;

Latta Richards, of Dyersburg;

James N. Hardin, of Greeneville;

William P. Moss, of Jackson;

Alfred W. Taylor, of Johnson City;

Erby L. Jenkins, John Doughty and William C. Wilson, of Knoxville;

Edward W. Kuhn, Charles G. Morgan, Walter Chandler, Larry Creson, S. Shepherd Tate and Lucius E. Burch, of Memphis;

Charles C. Trabue, Jr., J. Olin White, B. B. Gullett, J. O. Bass and Charles L. Cornelius, Jr., of Nashville;

Frank W. Wilson, of Oak Ridge.

Utah

The undersigned hereby nominate Dean N. Clayton, of Ogden, for the office of State Delegate for and from Utah to be elected in 1961 for a three-year term beginning at the adjournment of the 1961 Annual Meeting:

Thorpe Waddingham, of Delta;

Charles P. Olson, of Logan;

R. W. Campbell, C. DeMont Judd, Jr., Calvin Gould, Charles G. Cowley, Ira A. Huggins, Parley E. Norseth, Richard L. Stine, Paul T. Kunz, Jack A. Richards, LeRoy B. Young, Samuel H. Barker, Paul Thatcher, I. Gordon Huggins, Ralph J. Lowe, Darrell G. Renstrom, LaVar E. Stark, Grant S. Maw and Richard W. Brann, of Ogden;

George S. Ballif and George E. Ballif, of Provo;

William G. Fowler, Rex Hanson and Dean W. Sheffield, of Salt Lake City.

Utah

The undersigned hereby nominate Franklin Riter, of Salt Lake City, for the office of State Delegate for and from Utah to be elected in 1961 for a three-year term beginning at the adjournment of the 1961 Annual Meeting:

Lewis Jones, of Brigham City;

Sam Cline, of Milford;

David L. Stine, Arthur Woolley and David K. Holther of Ogden;

Carvel Mattsson and Sterling R. Bossard, of Richfield;

Harold R. Boyer, J. Allan Crockett, Lester A. Wade, L. M. Cummings, E. R. Callister, Jr., A. H. Ellett, Joseph G. Jeppson, Joseph S. Jones, Marcellus K. Snow, Dennis McCarthy, S. N. Cornwall, Harry D. Pugsley, Calvin A. Behle, C. C. Parsons, L. Delos Daines, Perris S. Jensen and Daniel J. Dykstra, of Salt Lake City;

Hugh W. Colton, of Vernal.

PROPERTY and PROFIT

CLIENT PROBLEMS—5

IF a government body wants to purchase a part of your client's property for public use . . . how would you advise him? Should he accept the amount offered or insist on a higher figure?

Book Value? You might use this as a basis for valuation, but inflation causes higher market values.

Fair Market Value? Trying to determine this by comparison of opinions, or the experience of friends can be more confusing than helpful.

To arrive at a proper answer requires a study of today's cost to replace structures, less the estimated depreciation. You would need to know accurately of the sales price of comparable properties.

Many counsellors have found that the best answer to this problem is to rely on the services of experts who are equipped to render fair market valuations of complex properties. Such a valuation can prove vital in negotiations with the government body, and, if the matter must be decided by a court, the testimony of an expert witness in support of the valuation report can be a decisive factor. In some cases, substantial sums in legal costs have been saved because an independent valuation by an expert established that the amount offered by the public organization was reasonably fair.

A nation-wide firm, Marshall and Stevens offers a staff of appraisal engineers fully experienced in the complexities of valuations for condemnation. A copy of the informative booklet, Condemnation and the Appraiser, is yours for the asking. Just write Marshall and Stevens, Department 14, 6 Church Street, New York 6, New York. Other offices in Chicago, Cincinnati, Dallas, Denver, Detroit, Houston, Los Angeles, Miami, Minneapolis, Montreal, Philadelphia, Phoenix, St. Louis, San Francisco, and Vancouver, B. C.

The Rule of Law in Outer Space

Professor Cooper discusses four problems that will have to be solved if the rule of law between states is to be extended to outer space. He warns that failure to solve these problems may mean disaster.

by John C. Cooper • *Legal Adviser, International Air Transport Association*

THE RULE OF LAW between states must be extended to outer space. Otherwise the world faces chaos and disaster. Peace may be at stake.

As Past President Rhyne of the American Bar Association said in his address on "World Peace Through Law" at the 1958 Annual Meeting:

> We live at the turning point in the history of civilization ... As we listen to the roar of current history it is absolutely clear that mankind—men and nations and races—must learn to live together or else see civilization as we know it perish in the senseless devastation of war. The atomic and hydrogen bombs, the ICBMs, the Sputniks, the Explorers and Vanguards have attuned the world to an overwhelming desire for peace ...

The United Nations, as recently as December, 1959, declared that the "use of outer space should be only for the betterment of mankind and to the benefit of states irrespective of their economic or scientific development". But little action has followed.

President Eisenhower, in his address to the General Assembly of the United Nations in September, 1960, warned the world, saying:

> Another problem confronting us involves outer space. The emergence of this new world poses a vital issue: Will outer space be preserved for peaceful use and developed for the benefit of all mankind? Or will it become another focus for the arms race—and thus an area of dangerous and sterile competition? The choice is urgent. It is ours to make ...
>
> National vested interests have not yet been developed in space or in celestial bodies. Barriers to agreement are now lower than they will ever be again.
>
> The opportunity may be fleeting. Before many years have passed, the point of no return may be behind us ...
>
> We must not lose the chance we still have to control the future of outer space.
>
> I propose that:
>
> 1. We agree that celestial bodies are not subject to national appropriation by any claims of sovereignty.
>
> 2. We agree that the nations of the world shall not engage in warlike activities on these bodies.
>
> 3. We agree, subject to appropriate verification, that no nation will put into orbit or station in outer space weapons of mass destruction. All launchings of space craft should be verified in advance by the United Nations.
>
> 4. We press forward with a program of international co-operation for constructive peaceful uses of outer space under the United Nations. Better weather forecasting, improved worldwide communications, and more effective exploration not only of outer space but of our own earth—these are but a few of the benefits of such co-operation.

Law, as a rule of human conduct, and international law, as a rule of the conduct of states, require certainty of application and clarity of subject matter. If President Eisenhower's proposals as to outer space are to be made effective, and if also the rule of law is to be there fully enforced, certain basic problems must be resolved. What is the area termed "outer space"? What is its legal status, that is, may a powerful state seize and control it, or is it free for the use of all states equally? What is the legal status of the satellites or other space craft used in outer space, particularly is the launching state responsible for their international good conduct as the state of the flag is for its ships and aircraft? Has the state over which such a space craft is put in orbit or is stationed any effective rights of self-protection and self-defense? These are fundamental questions. Until they are answered by international agreement President Eisenhower's detailed proposals may not fully protect our future.

1. *What Is Meant by the Term "Outer Space"?*

The term "outer space", when used in a legal or political sense, is comparatively new. The term "airspace" has long been used. But unfortunately neither term has been legally defined.

The term "airspace" appears in Article I of the Paris Convention of 1919. This provides that the "High Contracting Parties recognize that every Power has complete and exclusive sovereignty over the air space above its territory". The United States assisted actively in drafting this convention during the Paris Peace Conference and later signed but did not ratify it. We did, however, ratify the similar Havana Convention of 1928, and the Chicago Convention of 1944, which is now in effect. The latter provides that the contracting

states recognize that every state has complete and exclusive sovereignty over the airspace above its territory. This treaty provision is therefore part of our "law of the land". It can only mean that we have acknowledged the sovereignty of every other state—whether a party to the convention or not—as to the "airspace" over its lands and waters. This carries with it the "right of exclusion of foreign aircraft", as the Aeronautical Commission of the Paris Conference agreed in 1919 on the motion of the United States delegate, Admiral Knapp.

Should the airspace referred to in the Chicago Convention be construed to extend as far upward as the slightest traces of atmospheric gases are found, then any state may arbitrarily veto the flight of satellites above it, no matter how peaceful may be their use. But this I do not believe to be sound.

The most recent data generally available indicate that at least one or two satellites have been as close to the earth as 100 miles, or a little less, at the perigee (lower limit) of orbit. A well-known astronomer has stated that studies of meteors entering the earth's atmosphere show that the atmosphere below seventy miles, approximately, is too dense for a satellite to pursue an orbit. It would therefore appear that it may be possible for a satellite to be put in orbit at least once round the earth at some minimum altitude between seventy and one hundred miles above us.

Distinguished scientists have expressed the following views:

(a) At the surface of the earth the "air" consists of about 78 per cent molecular nitrogen, 20 per cent molecular oxygen, and small quantities of argon, carbon dioxide and water vapor.

(b) At fifty miles altitude the temperature has dropped sharply, the atmospheric density is only about one-millionth (1/1,000,000) of the surface density, and not sufficient to contribute in any appreciable degree to the aerodynamic lift of aircraft.

(c) At 100 miles or less, the temperature has increased up to 2,000° Fahrenheit or more, the atmospheric density has further decreased to one-billionth (1/1,000,000,000) of the surface density, the oxygen molecules have already broken down into separate oxygen atoms.

This extremely thin gaseous combination of a few nitrogen molecules, oxygen atoms, and perhaps particles of other gases, has little if any resemblance to the substance, ordinarily called "air", which we breathe and which is needed to support the flight of "aircraft" as envisaged when the Paris and Chicago Conventions accepted the principle of "airspace" sovereignty.

If the lower boundary of outer space is fixed by international agreement as the lowest altitude above the earth's surface at which an artificial satellite may be put in orbit around the earth, we should then have much more than a mere theoretical boundary. Below this boundary most objects moving from outer space towards the earth would be destroyed by heat from atmospheric friction. Above the boundary satellite flight would be practical.

Before Sputnik I was launched, I suggested to the American Society of International Law a new convention: first, reaffirming absolute sovereignty of the subjacent state up to the height at which "aircraft" could be operated; then further extending limited sovereignty upward to 300 miles above the earth's surface; then accepting the principle that all space above should be free for passage.

In 1957, a few weeks after Sputnik I was launched, I published a memorandum in which I pointed out that my 1956 suggestion was based on earlier and then widely accepted scientific opinion to the effect that somewhere not far below 300 miles the atmosphere had sufficient density to prevent free satellite flight, but that Sputnik I had proved this premise to be unsound. My primary view has always been that the airspace does not extend to the area in which a satellite may be put in orbit around the earth.

Any careful analysis of President Eisenhower's proposals to the United Nations will disclose that he dealt with "outer space" as an area in which satellites might be put in orbit. If international agreement is reached so as to define outer space as the area whose lower or inner boundary is the lowest altitude above the earth's surface at which an artificial satellite may be put in orbit at least once around the earth, the rule of law could then be applied without difficulty in a reasonably definite geographic area. As President Eisenhower said, "Barriers to agreement are now lower than they will ever be again." The Foreign Relations Committee of the United States Senate, in its June 25, 1960, report on "Events Relating to the Summit Conference", has joined in urging speedy action. It said:

> Finally, the U-2 incident has pointed up the need for international agreement on the question of how high sovereignty extends skyward. This question is certain to become more acute in the future as aircraft fly at higher altitudes and as space satellites, many of them equipped with cameras or other devices, become more common. It is a question full of difficulties and one which demands the full attention and consideration of the United Nations as well as of the individual nations themselves.

2. *What Is or Should Be the Legal Status of Outer Space?*

It is quite impossible to apply international legal principles in a satisfactory manner in any geographic area whose legal status is unknown. Today the legal status of outer space is as vague and uncertain as was the legal status of the high seas in the centuries before Grotius, in the *Mare Liberum*, focused attention on the need of the world to accept the doctrine of the freedom of the seas. Years after that historic event, a great American jurist, Mr. Justice Story, said in the case of *The Marianna Flora* (1826):

> Upon the ocean, then, in time of peace, all possess an entire equality. It is the common highway of all, appropriated to the use of all; and no one can vindicate to himself a superior prerogative there. Every ship sails there with the unquestionable right of pursuing her own lawful business without interruption; but whatever may be that business, she is bound to pursue it in such a manner as not to violate the rights of others.

The legal status of outer space should be fixed along these lines by international agreement. Certain jurists have argued that the failure of states to protest present satellite flights indicates

an acceptance of this status of outer space without further agreement. Others have insisted that it is not possible logically to consider the extension of sovereignty into outer space. The Ad Hoc Committee of the United Nations on the Peaceful Uses of Outer Space, appointed under a 1958 resolution, stated in its 1959 report that the launching and flight of space vehicles, on the premise of the permissibility of such flights, may have initiated "the recognition or establishment of a generally accepted rule to the effect that, in principle, outer space is, on conditions of equality, freely available for exploration and use by all in accordance with existing or future international law or agreements".

But we must deal with hard facts. A well-known American lawyer and air law lecturer, the late Arnold W. Knauth, pointed out in an address in Buenos Aires on August 24, 1960, that only about thirty-five months had then passed since Sputnik I was launched, and since that time there had been, perhaps, less than fifty launchings of other satellites and perhaps a hundred attempts, but that these launchings and attempts at launchings "are not adequate to formulate and create any customary law in space".

My own view has also long been that no general customary international law exists covering the legal status of outer space. It must never be forgotten that the Chicago Convention goes no further than declaring that each state has sovereignty in the airspace over its lands and waters. Nowhere does that Convention, nor any other international agreement of which I am aware, state that claims of sovereignty of a state must be limited to its airspace. Jurists may urge doubts as to the right of states to claim sovereignty in areas beyond the airspace, but there is no international agreement to that effect, nor am I aware of any formal and binding declaration of any state waiving any rights to claim sovereignty beyond the airspace, even to the far reaches of outer space.

The situation can be rectified only by a new international agreement. This might declare that no state has, or can have, sovereignty over outer space, or any part thereof, or any celestial bodies therein, and could at the same time make unlawful, as recommended by President Eisenhower, the orbiting or stationing in outer space of weapons of mass destruction, and that all launchings of space craft should be verified in advance by the United Nations. Thus the rule of law could be made effective in a reasonably definite area whose legal status has been determined.

3. *What Is the Legal Status of Satellites and Future Space Craft?*

In the law of the sea the legal status of the waters used and the vessels employed has long been settled. The high seas are free for the use of all. Territorial waters, bays, harbors and rivers have certain varying national characteristics. Vessels employed are said to have the "nationality" of the state of the flag. Under the law of the air, as exemplified in the Chicago Convention, the legal status of the airspace has been fixed, and it was agreed, as in the predecessor Paris Convention of 1919, that aircraft should have nationality.

The meaning of this term "nationality", as applied to ships and to aircraft, is quite well known. It symbolizes the acceptance of a rule of international law which states that a special relationship exists between a particular state and the transport instrumentality which has the "nationality" of that state. The effect of this special relationship is that the state of the flag is responsible for the international good conduct of its vessels and its aircraft when in use beyond national territory. And reciprocally, that state has the right, as against other states, to see to it that its national vessels and aircraft are accorded the privileges and rights to which they are legally entitled when away from home. This is a rule of public law and not of private law. It does not make the state of the flag responsible for such things as debts incurred in the operation of the vessel or the aircraft, but it does make the state of the flag responsible if such vessel or aircraft violates a rule of international law affecting the rights of other states. International law writers have often pointed out that on the high seas, uncontrolled by any national sovereignty, chaos would be the rule but for the fact that the principle of nationality of vessels has for centuries been accepted into maritime law, and that with this concept international order may be maintained.

John Cobb Copper is Professor Emeritus of International Air Law at McGill University and former Administrator of the American Bar Foundation. He is a Fellow of the American Academy of Arts and Sciences and a member of the American Rocket Society, the Institute of Aerospace Sciences, the International Academy of Astronautics, and the International Institute of Space Law.

It is interesting historically to note that the necessity of balloons having this quality of "nationality" was suggested in one of the earliest air law discussions. Fauchille's major thesis in 1902 and 1903 was that the air was free. But as a very able international lawyer, he accepted the fact that chaos might result if the instrumentalities in flight did not have the nationality of some particular state.

A few years later the problem was discussed at length at the 1910 Conference called by the French Government. While the Conference did not, for very different reasons, conclude a convention to regulate flight, no serious contention was ever made later against the application to aircraft of the maritime principle of "nationality". In fact this principle was widely recognized in the conduct of states between 1910 and the signature of the Paris Convention of 1919. For example, neutral states, such as the Netherlands, Switzerland and the Scandinavian countries enact-

ed and enforced rules during World War I which outlawed the flight of "foreign" aircraft over their territories. At the close of the war the nationality of aircraft was recognized in the Paris Convention, as it has been in every subsequent convention regulating air navigation, including the Chicago Convention of 1944. But the gravest doubt exists as to whether satellites and other flight instrumentalities, which can operate freely only in outer space, are "aircraft" within the present rules of international law dealing with required "nationality". If outer space is to be free for the use of all, the logic of Fauchille must again be applied. Every type of flight instrumentality usable in outer space must have the nationality of a state of the international community. Normally, this would be the launching state, which would thereby become responsible for the behavior of the satellite, or other space craft, so far as rules of international law are concerned.

The complicated functions which satellites are already performing illustrate this need. If the rule of law is to be effective in outer space, international regulations must be recognized and enforced, dealing, for example, with frequencies permitted to be used by radio equipment on a satellite. If it is admitted that a satellite has the "nationality" of the launching state, then that state can be held responsible without question if the satellite used unauthorized frequencies and thereby creates jamming or other types of international radio interference. This is but one example. Also reciprocally, when future control of outer space flight internationally has become effective, as it must, each state will have the right to protest against the interference with the flight of its satellites or other space craft, provided they are following authorized and internationally agreed patterns.

In the absence of the application of the requirement of flight instrumentality nationality, chaos and conflict will be inevitable in outer space.

4. *What Are or Should Be the Rights of Self-Protection?*

This question poses a most serious problem. Whether the legal status of outer space be left undetermined as at present, or whether it be fixed by international agreement as an area in which no state may claim sovereignty, the right of every state in the international community to act for its individual self-protection or self-defense must be fully acknowledged and carefully preserved. This is part of the rule of law between states.

As early as 1804 Chief Justice Marshall said in the celebrated case of *Church* v. *Hubbart:* "The authority of a nation within its own territory is absolute and exclusive . . . But its power to secure itself from injury may certainly be exercised beyond the limits of its territory." This statement still stands in our jurisprudence. It would be directly applicable to the right of a subjacent state to "secure itself from injury" in outer space beyond its territorial airspace.

In 1837, Daniel Webster, as Secretary of State, said during consideration of the celebrated *Caroline* case, that the necessity which justifies acts of self-defense outside national territory is "confined to cases in which the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation". This statement was cited with approval in the Nuremberg cases after World War II. However, I would point out that no emergency could leave less chance for deliberation than a threat from outer space.

Perhaps the most important analysis of the problem made in the United States is found in an address delivered in 1914 by the late Elihu Root speaking as President of the American Society of International Law. In discussing the "right of self-protection" as "a right recognized by international law" he said (8 A.J.I.L.-6): "The right is a necessary corollary of independent sovereignty. It is well understood that the exercise of the right of self-protection may and frequently does extend in its effect beyond the limits of the territorial jurisdiction of the State exercising it." Later, in the same address, in a much-quoted phrase he insisted upon "the right of every sovereign state to protect itself by preventing a condition of affairs in which it will be too late to protect itself".

May I point out that this principle of the right of a state to act for its self-protection outside its national territory has already been applied in connection with aircraft flight. In 1950 the United States and Canada established air defense identification zones around parts of their respective shores. Admittedly the airspace over the high seas is not territorial space and enjoys the same international status as the high seas themselves. Yet the United States and Canada did not hesitate to establish regulations to prevent unidentified aircraft approaching their shores from the seas. The United States regulation, for example, requires that foreign aircraft approaching our shores must report their presence and identification when not less than one hour or more than two hours average cruising distance via the most direct route to the shore. This is a clear application of the right of self-preservation and self-defense applicable outside national territory and within international flight space. It would seem that the same right exists for subjacent states to act in outer space above national territorial airspace to the extent deemed necessary for the protection and defense of the lands below.

Certainly any future agreement for international regulation of outer space flight, or control of outer space, must preserve such national rights of self-protection and self-defense. It is submitted that nothing in the United Nations Charter is opposed to this view. While Article 51 deals solely with the right of individual or collective self-defense "if an armed attack occurs against a member of the United Nations", it is my firm belief that this does not take away already-existing international law rights of self-protection which have long been supported as part of the international law applicable to all states. In any event, as suggested earlier, such rights should be specifically preserved in any convention dealing with the legal status of outer space.

Conclusion

Four fundamental problems have been stated and tentative answers suggested. First, that the boundaries of

outer space must be fixed and that the important lower boundary should be at a point above the surface of the earth where it is possible to put a satellite in orbit at least once round the earth.

Second, that the legal status of outer space must be fixed and that this could best be done by accepting a status similar to that of the high seas, thus permitting its equal use by all and denying to any state the right to assert sovereignty over outer space or any celestial bodies therein.

Third, that the legal status of satellites and of other space craft used in outer space must be determined, and that this status should be that of "nationality" of the launching state, or other agreed state, otherwise chaos will result.

Fourth, that the international law right of a state to take action in outer space for its self-protection and self-defense must be preserved and acknowledged, even though no state has a right to claim sovereignty therein.

It is suggested that these four fundamental questions of outer space law stated demand urgent international settlement. It is also suggested that the solutions here put forward, when taken together, would provide a reasonable and practical foundation for the future application of the rule of law in outer space.

The Sacco-Vanzetti Case: A Miscarriage of Justice

Although it took place nearly four decades ago, the trial of Sacco and Vanzetti for murder continues to be a subject of interest and controversy. Justice Musmanno is convinced of the innocence of the defendants. His article is in reply to Barry Reed's "The Sacco-Vanzetti Case: The Trial of the Century", which appeared in the August, 1960, issue of the *Journal*.

by Michael A. Musmanno • *Justice of the Supreme Court of Pennsylvania*

THE AUGUST, 1960, issue of the *American Bar Association Journal* carried a very interesting article entitled "The Sacco-Vanzetti Case: The Trial of the Century" by Barry C. Reed, of the Massachusetts Bar. Although Mr. Reed's article would seem to be an impartial discussion of the case, it is in fact heavily weighted on the side of the prosecution. Mr. Reed, I respectfully submit, errs in many particulars, not only because of what he says, but because of what he omits. For instance he makes no mention of the charges of prejudice against the trial judge and the foreman of the jury. Obviously if the tribunal trying Sacco and Vanzetti was biased against them, the verdict was tainted.

It was established by overwhelming proof that the trial judge was bitterly prejudiced against the defendants, had cursed them outside the courthouse and had remarked that he was going to "get them good and proper". One newspaper reporter, a man of thirty-six years' court experience, said that when Thayer ruled against the defendants in court he would do so "with the air of prejudice and scorn".

It was not denied that the foreman of the Sacco-Vanzetti jury was an Italian-hater and that before hearing a word of testimony, he made the remark that regardless of evidence: "Damn them, they ought to hang anyway!"

However, in spite of all the argument Mr. Reed advances to support the verdict of conviction, he still says at the end of his article: "Were Sacco and Vanzetti guilty? Perhaps."

This amazing inquiry, with its own answer, is in itself an admission that Sacco and Vanzetti should not have been convicted, because "*perhaps*" is the classic criterion of reasonable doubt which leads to an acquittal in America. It is absolutely frightful, although Mr. Reed does not seem to realize it, to think that two men could have been sent to their death with the admission that they were not "probably guilty", not "possibly guilty", but only "*perhaps* guilty". Mr. Reed shatters the backbone of his pro-conviction article with that admission.

Mr. Reed is a dramatic writer of ability. His story of the actual crime reads like fiction. Unfortunately, here and there, he apparently does introduce fiction. For instance, he says that as the death car in the South Braintree crime roared away from the scene of the murder,

> those caught in the gauntlet of fire on Pearl Street dug their fingernails into the sides of buildings or cowered in doorways as the death car swept past.

Since the buildings were constructed of brick, sheet iron or oakwood, one must conclude that either the people Mr. Reed describes possessed copper-plated fingernails or that Mr. Reed availed himself of considerable dramatic license.

In describing one of the victims of the murder, Allesandro Beradelli, payroll guard, Mr. Reed says that he walked in silence, "his thoughts on his 6-year-old daughter in the hospital with scarlet fever".

How does Mr. Reed know what Mr. Beradelli's thoughts were?

He said that as the bandits opened fire, "Instinctively Beradelli reached for his hip pocket before three more shots sprawled him on the roadway."

What Beradelli did instinctively is not in the record.

Mr. Reed fails to tell how the Sacco-Vanzetti case began. Without that indispensable preliminary, it is impossible to obtain an understanding perspective of the whole tragic affair.

On December 24, 1919, several men unsuccessfully attempted in Bridgewater, Massachusetts, to hold up a pay truck of the L. Q. White Shoe Company. On April 15, 1920, five men suc-

cessfully accomplished a payroll robbery in South Braintree, Massachusetts. In this latter crime, two men, Frederick A. Parmenter and Allesandro Beradelli, were shot and killed. The seized payroll amounted to about $16,000. On April 17, 1920, a Buick car, assumed to be the one used in both crimes, was found abandoned in West Bridgewater.

The Curious Theory of the Police

Michael Stewart, Chief of Police of Bridgewater, Massachusetts, learned that Mike Boda, who lived in West Bridgewater, had been seen driving a Buick car. He called on Boda, but was satisfied that Boda had nothing to do with the Bridgewater or the South Braintree crime. In the meantime, however, a nondescript person named C. A. Barr told Mr. Stewart that he had invented a detective machine by means of which he could ascertain who had committed certain crimes. He said that a woman living in East Boston had looked into the machine and had seen "the holdup happening".

The police, instead of ignoring such a statement as indicating some form of mental disease, proceeded to work on the theory advanced by Barr, who said that the bandits operated from a shed in which their car was stored and in which they changed their clothes. The police looked for such a shed.

About this time Department of Justice agents were seeking a Ferruccio Coacci for deportation because of alleged subversive activities. The local police who assisted the federal agents to locate, arrest and deport Coacci, found on Coacci's premises a shed which answered the description given by the "informer", the inventor of the "detective machine".

Mike Stewart went to this shed and found that the dirt floor had been recently raked over. Had the payroll money been buried there? He also found the treads of the tires of two cars, one large and one small. Stewart learned that the smaller car belonged to Mike Boda and had been taken to a garage shop in West Bridgewater for repairs four days after the South Braintree crime. This proximity in date suggested the theory that it could have been used in that crime. The ascertained fact that the car was old and decrepit and had not been run for five months failed to dislodge the theory. Stewart notified Mr. Johnson, owner of the garage, that he was not to release the car when Mike Boda or anyone else called for it. Instead, he was to notify the police.

With nothing to substantiate the theory and with positive proof that the Overland car could not under any circumstances have participated in either the Bridgewater or South Braintree crime, the police convinced themselves that whoever called for the Overland would be suspect of both crimes. This fact must be borne in mind throughout any review of the case. The reviewer must always realize that Sacco and Vanzetti fell into the iron grip of the Stewart trap not because of any evidence that they had ever been criminals but because of a fantastic, or at least hopelessly unsubstantiated, theory entertained by Stewart and his associates.

Four men did call for the Overland on the night of May 5, 1920. They were Mike Boda, Ricardo Orciani, Nicola Sacco and Bartolomeo Vanzetti, all workingmen with a fondness for books on theories of government, economics, political science and sociology. Some of the books they read were regarded as dangerous by A. Mitchell Palmer, United States Attorney General at the time who had ordered raids on all houses containing this so-called "radical literature". The possession of such literature led not only to arrest and detention, but possible deportation.

Hundreds of persons in the New England states had been subjected to forced seizure and detention as a result of the "Palmer raids". In most instances, the arrests were made without warrant of law and some of the detainees were even tortured. Violation of law by persons supposed to respect the law reached such scandalous proportions that Charles Evans Hughes, later Secretary of State, member of the World Court and Chief Justice of the Supreme Court of the United States, speaking for a committee of distinguished citizens, said:

> We cannot afford to ignore the indications that perhaps to an extent unparalleled in our history, the essentials of liberty are being disregarded. Very recently information has been laid by responsible citizens at the bar of public opinion of violations of personal rights which savor of the worst practices of tyranny.

Bartolomeo Vanzetti, a fish peddler living in Plymouth, was particularly concerned about these violations of human and constitutional rights. He was somewhat of a homespun philosopher, an omnivorous reader of books and called himself a "libertarian", or a "philosophical anarchist". He was worried, as were also Sacco, Boda and Orciani, about their friends having in their possession the "radical literature" which would subject them to the heinous practices denounced by Charles Evans Hughes. At the trial Sacco explained how and why they decided to gather up the literature:

> We decided in the meeting in Boston to get those books and papers, because in New York there was somebody said they were trying to arrest all the Socialists and the Radicals and we were afraid to get all the people arrested, so we were advised by some friends and we find out and Vanzetti take the responsibility to go over to the friends to get the books out and get in no trouble. The literature, I mean, the Socialist literature.

On the afternoon of May 5, the four men gathered at Sacco's house and agreed that that evening they would meet at the Johnson's garage in West Bridgewater to get the Overland automobile and with it travel through six or seven towns to pick up the "Socialist literature".

Nicola Sacco was a shoemaker employed at the Kelly Shoe Factory and lived in Stoughton. He had come to America in 1908 and ever since had been gainfully employed. On March 22 or 23, 1920, he received a letter from his father in Italy telling him his mother had died, and he at once began to make arrangements for a visit to Italy to see his father and his other relatives whom he had not seen for twelve years. It was now May 5 and he was to leave from New York with his wife and young son on May 8.

On this day, May 5, Vanzetti came to his home to help him pack his luggage. In addition to being employed

as a shoemaker at the Kelly factory, Sacco was a night watchman and, as such, carried a pistol. In his house he had extra cartridges for his pistol. He had purchased the extra cartridges, as he explained at the trial, in 1917 or 1918 "in the war times when the bullets are very scarce and you could not buy it". He now found these extra cartridges and decided to go out into the woods and fire them off, so as to avoid the possibility that they might be found by others after he left and be accidentally exploded. With this intention, he put the extra cartridges in his pocket. In gathering up odds and ends he also found four shotgun shells left by a hunter who had stayed at his home. Vanzetti said he would take them and perhaps sell them to a hunter in Plymouth and thereby gain a few extra pennies for the expenses required for the job of gathering up the literature they were to hide from Palmer's agents.

Sacco did not get a chance to shoot off the extra cartridges because

> We started to talk in the afternoon, me and Vanzetti, and half past four Orciani and Boda came over to the house, so we started an argument and I forgot about to go in the woods shooting, so it was still left in my pocket.

Vanzetti was also armed with a revolver because many robberies were being reported in these days, and, as a fish peddler, Vanzetti sometimes carried as much as $120 on his person.

Thus, Sacco and Vanzetti set off for their rendezvous with their firearms and extra cartridges in their pockets. The prosecution was to turn this chance circumstance into the most damning evidence against them. Boda and Orciani had preceded Sacco and Vanzetti to Bridgewater by motorcycle. Sacco and Vanzetti went by streetcar. The four met at the Johnson garage but Johnson refused to release Boda's automobile and at the same time, through his wife, notified the police. Boda and Orciani left on their motorcycle and Sacco and Vanzetti left by streetcar. (Here it might be asked parentheticallly: If Sacco and Vanzetti had only three weeks before completed a successful robbery, receiving, as their share, some $3,000 each, why would they be traveling around by streetcar?)

Sacco and Vanzetti were arrested by the police and questioned by Mike Stewart. Believing all the time that they had been detained because of their plans to gather up the "Socialist literature", and desiring to protect their friends who had the literature, Sacco and Vanzetti told lies as to where they had been and what they were doing. The next day they were examined by District Attorney Frederick Katzmann who put questions in such a manner that they thought he was trying to get admissions from them on their political activities. They lied again. Later Katzmann was to argue that the men had told falsehoods in order to avoid implicating themselves in the bandit crimes. *At no time were Sacco and Vanzetti informed during the Stewart and Katzmann examinations that they were being considered as suspects of robbery and murder.*

Sacco could not be charged with participation in the Bridgewater attempted robbery of December 24, 1919, because his factory record showed he was working that day. However, he was absent from work on April 15, 1920 (the day he went to Boston to see about his passport) and he was accordingly charged with participating in the South Braintree murders. Vanzetti, being his own employer, had no work records to show that he was employed on both December 24, 1919, and April 15, 1920, and he accordingly was charged with both crimes.

Vanzetti's Trial for the Bridgewater Crime

Mr. Reed says that at the trial in Plymouth for the Bridgewater crime, Vanzetti was "identified by five witnesses as at or near the scene of the crime". The driver of the L. Q. White truck was B. F. Bowles. On the day of the actual crime he described one of the bandits as having a "closely cropped" mustache. Vanzetti, on the contrary, had a large bushy walrus mustache. It was his most distinctive facial feature. However, at the trial, Bowles, who was a town constable and police officer under Stewart, now said Vanzetti was that bandit.

The second witness, Alfred Cox, said, with regard to the identification: "I think there is a doubt." The judge pressed him and he finally said: "I think he looks enough like the man to be the man."

The third witness, Frank W. Harding, told detectives immediately after the crime that he "did not get much of a look at his face". Later he said he did not see the faces of any of the bandits. Still later he was employed by the White Shoe Company. On the stand he identified Vanzetti. Incidentally, he also identified Orciani as one of the bandits, but Orciani had to be released because, like Sacco, on that day he had a time-clock alibi.

The fourth witness was Mrs. Georgina F. Brooks, who "identified" Vanzetti as one of the bandits, although it was shown indisputably that there were two two-story buildings between her and the happening of the crime.

And then there was Maynard Shaw, a 14-year-old boy who said he knew the bandit was a foreigner "by the way he ran". He explained that the bandit was not an American, a Chinese, a Japanese, or an African. Of course, Vanzetti, being an Italian, that made him the bandit. And not a word of caution from the judge as the jury in a court of law gulped down this fantasy.

Vanzetti's defense was absolute and complete. The day before Christmas is an important day in every Christian's life, but especially among Italian Roman Catholics who enjoy a type of supper peculiar to Christmas Eve. In Plymouth most of the Italians hailed from that part of Italy which made eel, prepared in various fashions, the specialty of the Christmas Eve supper. Vanzetti was much in evidence on December 24, selling and delivering eels all over the town. Sixteen witnesses testified to having seen Vanzetti in Plymouth on December 24, the day a crime was being committed twenty-two miles away in Bridgewater.

Vanzetti's attorney, John Vahey, counselled him not to testify. He told him that if he took the stand he would be questioned by the District Attorney about the labor and "radical" organizations he belonged to, and this would prejudice him in the eyes of the Yankee jury. Vanzetti, as well as Sacco, had been very active in the labor union movement in New England and both

were regarded as "labor agitators". Before taking up fish peddling, Vanzetti had been employed in the Plymouth Cordage Company plant in Plymouth and had taken a prominent part in a strike against the company. He had made many speeches in behalf of the workers and then, when the strike was settled, the company blacklisted him.

Vahey explained to Vanzetti that if he testified, his participation in the Plymouth Cordage strike would be brought out, and this would particularly antagonize one of the jurors against him since this particular juror was employed as a foreman at the Plymouth Cordage. Vanzetti, although insisting on testifying (what other way did he have to tell the world he was innocent of crime?) finally gave in to his attorney's advice. It was bad advice because Katzmann told the jury in another way that Vanzetti had been a labor organizer and that he was a radical. Cross-examining John Di Carli, one of the defense witnesses, Katzmann asked:

> Do you belong to any organization that he [Vanzetti] belongs to?
>
> Have you not discussed governmental theories over there between you?
>
> Have you not discussed between you and Vanzetti the question of supply and demand?
>
> Have you not discussed the question of the poor man and the rich man between you?

Of another defense witness, Katzmann asked in cross-examination:

> Did you hear them [Vanzetti and the witness's father] talk about our Government?
>
> Did your papa and Vanzetti and the baker belong to any society or organization?
>
> Did you ever hear Mr. Vanzetti making any speeches to the Italians?

Of still another witness, Katzmann asked:

> Do you belong to any organization that Vanzetti belongs to?
>
> Do you know anything of his political beliefs?
>
> Have you ever heard him make any speeches to fellow-workers at the Cordage?

None of these questions had anything to do with whether or not Vanzetti was at Bridgewater on December 24, 1919. They were not even proper on the matter of testing credibility. What possible relevancy to the issue before the jury could there be to the question: "Have you not discussed the question of the poor man and the rich man between you [the witness and Vanzetti]?"

Vanzetti was somewhat of an itinerant philosopher, and his talk which was considered "radical" by many had not gone unnoticed in the town. Katzmann obviously framed his questions so that the jury could believe that Vanzetti was a man of extreme views.

Vanzetti was convicted. Considering that his attorney kept him off the stand, allowed Katzmann to put prejudice-laden questions to defense witnesses and allowed him further to ridicule Vanzetti's witnesses because most of them were Italian, it would have been a miracle if Vanzetti had been acquitted. It may be interesting to note here, parenthetically, that Vahey, later on, went into partnership with Katzmann in the practice of the law, while the Sacco-Vanzetti case was still pending in the courts.

Thus, due to Katzmann's long-range planning, Vanzetti appeared before the jury in the Dedham courthouse to stand trial for participation in the South Braintree crime as a convicted bandit. Counsel for Sacco and Vanzetti moved for separate trials. Every element of justice demanded the cases be tried separately but Judge Webster Thayer, who had presided over the Plymouth trial and now was the Dedham trial judge, refused the motion.

The Unreliability of the Braintree Witnesses

Mr. Reed enumerates the following persons as identifying Sacco as one of the South Braintree bandits: Mary Splaine, Frances Devlin, Lola Andrews, Joseph Pelser, Carlos E. Goodridge, William S. Tracy and William J. Heon [correct spelling Heron]. Let me point out in a few words how utterly unreliable these witnesses were.

Immediately after the crime, Miss Splaine identified, by means of a photograph, a Tony Palmisano as the man she saw in the bandit car. At the preliminary hearing of Sacco she said that her opportunity to see the bandit did not give her the right to say that Sacco was the man. Her view of the bandit, incidentally, was limited to two seconds and the escaping car was seventy feet away. At the trial she "identified" Sacco as the bandit, giving sixteen points of identification, even to the shade of the eyebrows! Of course, Sacco was directly before her as she testified.

Miss Devlin had also, immediately after the crime, identified Tony Palmisano as the man she now said was Sacco. The only reason Palmisano was not indicted for the South Braintree crime is that he was in Sing Sing prison at the time of the South Braintree crime!

Justice Michael A. Musmanno of the Pennsylvania Supreme Court entered the *Sacco-Vanzetti* case as volunteer defense counsel in the early part of 1927 and is author of two books on the subject: *After Twelve Years* and *Verdict*. He served two terms in the Pennsylvania Legislature and has been a judge since 1932. President Truman appointed him to the International War Crimes Tribunal in Nuremberg, where he presided over the "Einsatzgruppen "Trial". In World War II he was naval aide to General Mark W. Clark and is now a Rear Admiral, U.S.N.R. Ret. He is the author of ten books.

In January, 1921, defense counsel showed Mrs. Lola Andrews a number of photographs, among which were pictures of Sacco and Vanzetti. She was asked if she identified any of them as the man she claimed to have seen on the street just before she went into the Rice and Hutchins factory (in front of which the murders occurred) on the day of the crime. She answered in the negative. Still later she told police she had not seen the faces of the men in front of the shoe factory. Mrs. Andrews had had some "trouble" in the past. The prosecution talked to her. She told one of her neighbors that the "Government" was "bothering the life out of her", that they wanted her "to recognize those men", but that "I have never seen them and I can't recognize them".

Defense counsel assumed Mrs. Andrews would testify for Sacco. When she came to court, she testified for the prosecution.

John Pelser was in the Rice and Hutchins factory as the shooting took place. After it was over he told various fellow-employees: "I did not see any of the men, but I got the number of the car." At the police station he was asked to look at Sacco and Vanzetti. He said: "I did not see enough to be able to identify anybody."

He was discharged from his job. A couple of weeks later he was re-employed by Rice and Hutchins. A foreman of the shoe company talked to him from time to time about the case. At the trial he identified Sacco.

Carlos E. Goodridge, a criminal himself (enjoying the dubious distinction of having once been a horse thief), was standing on the street as the bandit car swept by. He told three men that if he was asked to say who was in the car he wouldn't be able to identify anybody. Later he was brought into court to answer to a charge of larceny. The prosecution arranged to have Sacco in the courtroom at the time. Goodridge was asked if he recognized Sacco as one of the men he saw in the bandit car. He answered in the affirmative. He was placed on parole and at the Dedham trial he identified Sacco as one of the bandits. The defense was not permitted to show or even cross-examine on the subject as to whether Goodridge had not identified Sacco in exchange for the parole given him.

The South Braintree crime occurred at 3 P.M. William S. Tracy testified that at 11:40 A.M. he saw Sacco standing in front of a drug store in South Braintree. Although Sacco's picture had appeared in the newspapers at the time of his arrest and Tracy saw it, he made no effort to notify the authorities that this was the man he had seen at the drugstore. Ten months later he was taken to the Dedham County jail and, contrary to all fair identifying procedures, was shown Sacco alone. There he made his "identification".

William J. Heron testified that at 12:27 P.M. on April 15 he had seen two Italians at the railroad station in South Braintree. He said that he had not noticed any outstanding physical characteristic of either man, and when asked: "And, being perfectly frank and honest, Mr. Heron, you didn't look them over with any serious thought at all, did you?" he answered: "No."

Heron refused to make any statement to the defense prior to the trial because the prosecution had seen him first. He explained also to defense counsel that he did not want to be a witness. However, he appeared at the trial on behalf of the prosecution.

This constituted the identification of Sacco as one of the South Braintree bandits. The "identification" of Vanzetti was even less substantive. Michael Levangie, gatetender at the railroad crossing in South Braintree, testified that he saw Vanzetti driving the car. Immediately after the happening of the crime Levangie told reporters that he was "too damn scared to see anyone". A half-hour after the shooting, a locomotive fireman asked Levangie if he would know the men if he saw them. Levangie said: "No." He told the freight and ticket agent of the railroad that it would be "hard to identify these men". He told a Pinkerton operative that the driver of the car was a man who was "clean shaven" and had a "long hooked nose".

Yet at the trial Levangie said Vanzetti (who had a conspicuous walrus mustache and no long hooked nose) was the driver of the murder car. Thirty-five people saw one or more of the bandits. Of these thirty-five, Levangie was the only one who said Vanzetti was the driver. And Vanzetti had never driven an automobile in his life!

Mr. Reed says that Vanzetti "was connected to the crime mainly by Austin T. Reed, a railroad gatetender who told of stopping a car at 4:15 P.M. for a train" at the Matfield crossing. It will be noted that this was an hour and fifteen minutes after the crime, nor could it be established that this was actually the bandit car. Gatetender Reed could not tell whether the car had side curtains or not. In addition, although he identified Vanzetti and acknowledged that there were four other men in the car he could not describe any of them. He said that Vanzetti, speaking in "unmistakable and clear" English, demanded to know of him: "What to hell did you hold us up for?" It was admitted by everybody that at this time Vanzetti spoke broken English with a very decided Italian accent.

The Commonwealth contended that one of the bullets found in the body of Beradelli had been fired through Sacco's pistol. Mr. Reed makes no mention of the deception practiced on the jury by District Attorney Katzmann in this respect. Captain Proctor of the State Police told Katzmann that after having made several tests he found no evidence that the fatal bullet came from Sacco's pistol. Katzmann, however, was very dissatisfied with this report and exhorted Proctor to testify in such a manner as to convey the impression that Sacço shot Beradelli without actually stating so literally. Thus, at the trial Katzmann's assistant asked Proctor his opinion as to whether the fatal bullet went through Sacco's pistol. Proctor replied that it was "consistent with being fired through that pistol". The strict interpretation of the answer meant that the bullet *might have been fired* through Sacco's pistol because his pistol was a .32 Colt automatic. But, on that basis, it *could have been fired* through any one of the other 200,000 Colt .32's in existence at the time.

The ruse worked. The jury was fooled into believing that Proctor said the mortal bullet went through Sacco's

pistol. The judge so charged them, and Katzmann told the jury: "You may disregard all identification testimony and base your verdict on the testimony of these experts."

After the trial Proctor confessed to this deception and related how the District Attorney and his assistant had repeatedly asked him to testify in the manner he did. In reply, the District Attorney and his assistant merely denied that they had "repeatedly" asked him. United States Supreme Court Justice Felix Frankfurter, in his superbly fascinating and informative book, *Felix Frankfurter Reminisces*, tells of this disclosure. In vivid language he condemns what was done by the District Attorney:

> I didn't care whether it was "repeatedly" or only once that he asked Proctor whether the mortal bullet found in Beradelli's body was the bullet that came from Sacco's pistol. If he asked him once, and Proctor said, "I couldn't tell you," and that he got from Proctor his opinion that "it is consistent with having been fired by that pistol,"—that is so misleading a matter to be allowed to put to a jury, because the jury didn't make that nice, subtle distinction.

With regard to Vanzetti, the Commonwealth made the startling charge that the revolver the fish peddler carried had been taken from the slain guard Beradelli. This preposterous hypothesis presupposes that the actual bandit would have gone into a fatal shooting expedition unarmed, hoping only that he might be able to pick up a firearm from one of the guards shot down by his companions. The defense traced the history of Vanzetti's revolver for five years prior to May 5, 1920, with not a link in that chain of previous possession touching Beradelli in any way. The Commonwealth contended that Beradelli's revolver had had a new hammer installed immediately before the crime. Expert witnesses testified that Vanzetti's revolver did not have a new hammer. The Commonwealth did not rebut this.

Mr. Reed says that: "Discovered at the scene was a dark cap, purportedly dropped by Beradelli's assassin." An attempt was made to show that this cap belonged to Sacco. Mr. Reed uses the right word when he says "purportedly", but is a *purported* something evidence to be used in a criminal case?

In the first place, there was no evidence that any bandit had dropped a cap. The Chief of Police who had the cap in possession for over a year was not called to testify. (It developed later there was a reason for this.) There was a hole in the lining of the cap. Katzmann contended that this was proof the cap belonged to Sacco because Sacco had a habit of hanging his cap on a nail above his workbench and this in time produced the hole in the lining. The fact is, and it was later established irrefutably, that the hole had been made by the Chief of Police looking for an identifying mark, and that was the reason the prosecution did not call him as a witness.

As at the Plymouth trial, the defense at Dedham was completely exculpatory. On April 15, 1920, Sacco was in Boston making arrangements for his passport to Italy. On that same day Vanzetti was in Plymouth attending to his usual occupation of selling fish. The alibi of both defendants was supported by eighteen witnesses. If true, the men had to be innocent. Vanzetti could not have been at South Braintree and at Plymouth at the same time. Sacco could not have been in Boston and South Braintree at the same time. The Commonwealth did not call one witness to challenge the veracity or the accuracy of recollection of the alibi witnesses. Thus it was very important that the jury be instructed fully by the trial judge on the importance of the alibi. The jury should have had from the judge at least a résumé of the testimony, which, if believed, had to acquit the defendants. The judge in his charge gave the whole subject of alibi *two paragraphs!*

The Unfairness of the Prosecution

Mr. Reed not only does not mention the proved charges of prejudice against the trial judge, but he lauds Katzmann, saying that he "had a reputation among the Bar of not hitting below the belt". That Katzmann was able, shrewd and resourceful must be admitted, but to say that he did not hit below the belt is to use a euphemism which cannot be supported by the record. His conduct in the Proctor episode is enough to show how far below the belt he would strike in his determination to send the defendants to the electric chair, regardless of trustworthy evidence. It was established that several eye witnesses to the killing were interviewed by Katzmann but he did not call them to testify because they would say that Sacco and Vanzetti were *not* among the bandits. Nor did Katzmann tell defense counsel of the existence of these vital witnesses, as ethically and in good conscience he was required to do.

Katzmann's cross-examination was often unfair and even unscrupulous. Mr. Reed says rather proudly that Sacco "was no match for the resolute Katzmann". Of course he was not. Katzmann was a Harvard graduate and a veteran of the courtroom. Sacco was an unschooled shoemaker on trial for his life, the first time in a courtroom and testifying in a language more or less strange to him. Katzmann took unconscionable advantage of this.

Sacco and Vanzetti were pacifists and went to Mexico to avoid registration for conscription in World War I. Being Italian citizens, they were not subject to the draft, but they had not been informed of their status in this respect. Nevertheless, Katzmann excoriated them on the witness stand for what they had innocently done. In cross-examining Vanzetti, Katzmann's first question was: "So, you left Plymouth, Mr. Vanzetti, in May, 1917, to dodge the draft, didn't you?"

The question was not put as an inquiry. It was put as an accusation, an indictment, a branding stigma. Newspaper reporters recorded that Katzmann's voice "rang vibrantly through the courtroom".

After Vanzetti replied: "Yes, sir," Katzmann followed with: "When this country was at war, you ran away so you would not have to fight as a soldier?"

Vanzetti once more replied: "Yes, sir."

Katzmann had not yet twisted dry the wet rag of sly insinuation, so he asked again: "Is it true?"

And Vanzetti replied: "It is true."

Of Sacco, Katzmann asked: "Did

you love this country in the month of May, 1917?"

It was in this month that Sacco went to Mexico. And when Sacco replied in the affirmative, Katzmann asked: "And in order to show your love for the United States of America, when she was about to call upon you to become a soldier, you ran away to Mexico?"

One of the principal functions of a trial judge is to see that lawyers do not stray away from the principal issue. It is his duty to see that jurors are protected from outside influences, because, being human, they possess all the weaknesses, foibles, likes and dislikes of man. It is not enough to tell jurors they must leave behind them their prejudices. The judge should see to it that no meat is served to feed those prejudices, but when defense counsel objected to Katzmann's question, the judge indicated that the only fault in the question was that Katzmann asked if Sacco *ran* away, and there was no evidence he *ran* away. If the District Attorney would ask: Did he *go* away? the question would be proper. Whereupon, Katzmann, having been instructed on how to ask the same prejudice-laden question in a legal way, inquired: "Did you *go* to Mexico to avoid being a soldier for this country that you loved?"

When Sacco answered: "Yes," Katzmann then asked whether Sacco loved his country when he returned from Mexico, and Sacco replied: "I don't think I could change my opinion in three months."

Taking the violent assumption that there was some relevancy to this line of questioning, its purpose seemed now to have been more than fulfilled. Sacco had admitted he had left the country to avoid military service and Katzmann had sarcastically commented on it. That would appear to have exhausted the subject, but Katzmann had not yet shown how far below the belt he could strike. He now went into the deepest depths of racial prejudice, with an occasional glance at the foreman of the jury who had said that if he had his way he would keep Italians (he called them "dagos") out of the country.

The issue was whether Sacco had committed a murder, but Katzmann demanded to know of Sacco:

> Is Italy a free country?
>
> Is it a republic?
>
> Do you know how many children the city of Boston is educating in the public schools free?
>
> Why didn't you go back there? [To Italy.]
>
> Why didn't you intend to stay back there when you went back?
>
> Were you going to have your father support you?
>
> You love work?
>
> Do you love it as much as you love this country?
>
> Don't you know Harvard University educates more boys of poor people than any other university in the United States?
>
> Does your boy go to the public schools?
>
> Have you free nursing where you come from in Stoughton?

Time after time defense counsel objected to this type of questioning, but Judge Thayer did not stop it. In many ways he invited it and contributed questions of his own which helped to charge the atmosphere of prejudice against the defendants and which the jury could not help breathing, consciously and unconsciously.

In his final argument, Katzmann called upon the jurors to convict Sacco and Vanzetti as a matter of local prejudice. His final ringing words were: "Stand together, men of Norfolk!"

And then came the judge's charge, delivered over several banks of floral pieces, one of them presented by the sheriff who had charge of the jury.

The Prejudice of the Trial Judge

Space does not permit going into the unfairness and the inadequacy, as well as misleading character of the judge's charge. Only one instance will be given. Judge Thayer said:

> The law does not require that evidence shall be positive or certain in order to be competent. Overpositiveness in identification might under some circumstances and conditions be evidence of weakness in the testimony, rather than strength.

Why shouldn't a witness be positive when his testimony may invoke the irrevocable penalty of death?

Judge Thayer said further:

> Any evidence that tends in any degree, however slight, to prove a likeness or similarity between the defendants and the assailants is admissible.

This would mean that if a fleeting glimpse of a murderer revealed he had black hair, then every person with black hair could be accused of the murder.

Sacco and Vanzetti were convicted. Considering that the Commonwealth made every effort from the very beginning to have the jury assume that Sacco and Vanzetti were desperadoes, surrounding and crowding the courtroom with armed guards, it would be a miracle if they had been acquitted.

After the conviction, a Celestino Madeiros confessed that he was in the South Braintree crime and that Sacco and Vanzetti were not. Mr. Reed says of this confession that "less credence" was given to it because Madeiros "was awaiting appeal from a conviction of slaying a bank cashier". With all respect, I would say that Mr. Reed's logic is faulty. At the time that Mr. Madeiros confessed to the South Braintree crime, he was under sentence of death for a killing committed in a bank robbery. He appealed the conviction. Confessing to still another crime certainly would not help his case in the pending appeal. Nevertheless his innate sense of decency compelled him to declare that he did not want to see two men go to their death for a crime he *knew* they did not commit. Thus, his confession was really strengthened by this fact, rather than weakened, because it excluded the motive of self-help.

In support of his conclusion that Sacco and Vanzetti were given every opportunity to establish their innocence, Mr. Reed says:

> Massachusetts Governor Fuller, in June, 1927, appointed Harvard President Lowell, Massachusetts Institute of Technology President Stratton and former Probate Judge Grant as a special advisory committee to investigate the case. Its report was unanimous: the defendants were guilty beyond a reasonable doubt and the trial had been fair.

Justice Frankfurter, in his excellent book already referred to, quotes John F. Moors as follows:

> Lawrence Lowell was incapable of seeing that two wops could be right and the Yankee judiciary could be wrong.

From personal observation, I can attest that Mr. Moors' appraisal is justifiable. I can also attest to the justification of Justice Frankfurter's observation:

> If another judge had presided, or if the governor of Massachusetts at that time had been a less crude, illiterate, self-confident, purse-proud creature than Alvin Fuller, other things might have happened.

Among those "other things" would have been the release of Sacco and Vanzetti from conviction of a crime which the record unequivocally establishes they did not commit.

The fault in the conviction and execution of two innocent men was not that of the Commonwealth of Massachusetts, but of some men who erred maliciously and purposefully, some who were not worthy of the honored accolade of Massachusetts' citizenship and some who erred unintentionally. For these reasons I am satisfied that it will not be long until Massachusetts will undo the conviction of Sacco and Vanzetti as she did the condemnation of Anne Hutchinson, Ann Purdeator and the other poor mortals who were designated as "Salem witches".

Notice by the Board of Elections

The following jurisdictions will elect a State Delegate for a three-year term beginning at the adjournment of the 1961 Annual Meeting and ending at the adjournment of the 1964 Annual Meeting:

Arkansas	Louisiana	New York
Colorado	Maryland	Ohio
Delaware	Minnesota	Oregon
Georgia	Nevada	Rhode Island
Idaho	New Hampshire	Utah
Indiana		West Virginia

State Delegates will be elected in Tennessee and Vermont, each to fill the vacancy in the term ending at the adjournment of the 1962 Annual Meeting.

Nominating petitions for all State Delegates to be elected in 1961 must be filed with the Board of Elections not later than March 10, 1961. Petitions received too late for publication in the March issue of the *Journal* (deadline for receipt February 1) cannot be published prior to distribution of ballots, which will take place on or about March 20, 1961.

Forms of nominating petitions may be obtained from the Headquarters of the American Bar Association, 1155 East 60th Street, Chicago 37, Illinois. Nominating petitions must be received at the Headquarters of the Association before the close of business at 5:00 P.M., March 10, 1961.

Attention is called to Section 5, Article VI of the Constitution, which provides:

> Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such state.

Only signatures of members in good standing will be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers in the order in which they appear on the petition.

Any member of the Association in good standing in a state where the election is being held is eligible to be a candidate. There is no limit to the number of candidates who may be nominated in any state and nominations are made only on the initiative of the members themselves. While more than the required minimum of twenty-five names of members in good standing may appear on a nominating petition, special notice is hereby given that no more than twenty-five names of signers of any petition will be published.

Ballots will be mailed to the members in good standing accredited to the states in which elections are to be held not later than fifteen days after the time for filing nominating petitions expires.

BOARD OF ELECTIONS
John R. Dethmers, Chairman
Harold L. Reeve
Robert B. Troutman

The Hayes-Tilden Election Contest

While the closest Presidential election of the twentieth century is still fresh in our minds, Mr. Lewis recalls the Hayes-Tilden contest of eighty-four years ago, a contest that was finally settled less than forty-eight hours before the inauguration. Even today, historians argue that Samuel J. Tilden, not Rutherford B. Hayes, was really elected as the nineteenth President of the United States.

by Walker Lewis • ***of the Maryland and District of Columbia Bars***

THE HAYES-TILDEN election contest furnishes one of the great object lessons of United States constitutional history. Just as the impeachment of President Johnson showed the fallacy of entrusting a judicial function to a political body, so did the Electoral Commission of 1877 prove the impropriety of referring political questions to members of the Supreme Court.

The Election

The Republicans who came into power in 1860 were zealots. For a time they were moderated by the wisdom, strength and tolerance of Abraham Lincoln. But even before his assassination, the radical leaders of the party rebelled against his leniency toward the South. After his death they seized control and forced through a punitive policy of Reconstruction.

Nothing is sometimes so fatal as success. After the Radical Republicans had achieved overwhelming victory, they fell apart. Principle yielded to power and, in all too many instances, to profit. Never has American history seen an equal orgy of corruption.

The scandals of the Grant Administration, plus the Panic of 1873, triggered a reaction. In the congressional election of 1874 a Democratic tidal wave swept twenty-three of the thirty-five states. The Senate remained Republican, but in the House of Representatives Democrats gained a majority of sixty-three. In December, 1875, by a vote of 233 to 18, the House adopted a resolution declaring that a third presidential term for Grant would be "unwise, unpatriotic, and fraught with peril to our free institutions". For the first time in twenty years it appeared that the Democrats would capture the Presidency.

At their Cincinnati convention in June, 1876, the Republicans nominated Rutherford B. Hayes for President and William A. Wheeler for Vice President. The Democrats followed, at St. Louis, with Samuel J. Tilden and Thomas A. Hendricks.

Three other parties placed candidates in the field: the Prohibition Reform Party, the American Nationals, and the Independent Nationals, generally known as "Greenbackers" because of their advocacy of paper money. None of these gained any electoral votes, but five Greenbackers were elected to the Illinois legislature, a result that was destined to have a crucial effect upon the Presidency. It was the Prohibition Party's debut on the national scene and Mrs. Hayes, a leader in the W.C.T.U., stole its thunder by promising to dry up the White House. This she later did, so thoroughly that Secretary of State William M. Evarts was later to remark that at state dinners, "water flowed like champagne".

Hayes was the posthumous son of an Ohio farmer. He attended Kenyon College and Harvard Law School, and ultimately hung out his shingle in Cincinnati, where at first he slept in his office to save expense. During the Civil War he became a Union general, and at the time of his nomination for President he was Governor of Ohio.

Tilden was born at New Lebanon, New York, and studied briefly at Yale but was so homesick that he transferred to the University of the City of New York. He was admitted to the Bar in 1841, became a specialist in railroad reorganizations and accumulated one of the largest personal fortunes of his day. After leading the successful fight against the corrupt Tweed Ring, he was swept into the governorship of New York in 1874. He is said to have possessed the most incisive intellect in public life. His work habits were relentless and he expected equal devotion from his associates, once saying that "a man who is not a monomaniac is not worth a damn".

Neither Hayes nor Tilden made any speeches. Notwithstanding their inactivity, it was a campaign of exceptional bitterness. The hatreds of the Civil War were deliberately revived and charges of corruption were countered with charges of treason.

When the vote was tallied, Tilden had received a popular majority of over a quarter of a million. It also seemed, initially, that he had a majority of the electoral votes. On Wednes-

day, November 8, 1876, the strongly partisan *Indianapolis Journal* reported:

> TILDEN AND HENDRICKS UNDOUBTEDLY ELECTED.
>
> With the result before us at this writing we see no escape from the conclusion that Tilden and Hendricks are elected. The Democrats have doubtless carried every Southern state, together with the states of New York, New Jersey, Connecticut, and Indiana, with possibly Wisconsin. No returns have been received from the Pacific coast, but none that may be received can materially alter the present aspect of the case. Tilden is elected. The announcement will carry pain to every loyal heart in the nation, but the inevitable truth may as well be stated.

Tilden's election was conceded by all major newspapers, except one. The *New York Times*, then staunchly Republican, was pessimistic but unconvinced. In its first edition after the election it stated that the outcome was still doubtful, depending upon New Jersey, Oregon and Florida. Then, at 3:45 A.M., while its editors, John Foord, George Shepard, Edward Cary and John Reid, were gloomily discussing the next edition, a dispatch was received from D. A. Magone of Democratic headquarters, asking, "Please give your estimate of electoral votes secured for Tilden. Answer at once." A further message, from Democratic Senator William Barnum, asked for information about Florida, Louisiana and South Carolina.

By this time New Jersey had gone solidly for Tilden. But if Democratic headquarters was itself in doubt why should the Republicans concede? The *Times* quickly changed its editorial to declare that only Florida remained doubtful and to claim all other unconceded states for the Republicans, including some that it had previously listed in the opposite column. It stated:

> Conceding New York to Mr. Tilden, he will receive the electoral votes of the following states:
>
Alabama	10
Arkansas	6
Connecticut	6
Delaware	3
Georgia	11
Indiana	15
Kentucky	12
Maryland	8
Mississippi	8
Missouri	15
New Jersey	9
New York	35
North Carolina	10
Tennessee	12
Texas	8
Virginia	11
West Virginia	5
Total	184

> General Hayes will receive the votes of the following states:
>
California	6
Colorado	3
Illinois	21
Iowa	11
Kansas	5
Louisiana	8
Maine	7
Massachusetts	13
Michigan	11
Minnesota	5
Nebraska	3
Nevada	3
New Hampshire	5
Ohio	22
Oregon	3
Pennsylvania	29
Rhode Island	4
South Carolina	7
Vermont	5
Wisconsin	10
Total	181

> This leaves Florida alone still in doubt. If the Republicans have carried that state, as they claim, they will have 185 votes—a majority of one.

The *Times* did not merely editorialize—it acted. John Reid rushed to Republican headquarters in the Fifth Avenue Hotel to report the Democratic doubts and to urge prompt action to reclaim the wavering states. According to his story, later published in the *Times* of June 15, 1887, he found only charwomen. But just then Republican National Committeeman William E. Chandler, of New Hampshire, came in and blurted out, "Damn the men who have brought this disaster upon the Republican Party!" Reid encouraged him with his news of Democratic doubts and together they went to the room of Senator Zach Chandler, the campaign chairman. Zach had gone to bed in a state of exhaustion, and, as much to be left alone as for any other reason, said, "go ahead and do what you think necessary".

John Reid and William Chandler thereupon wrote telegrams to D. H. Chamberlain, of South Carolina, to S. B. Conover, of Florida, and to S. B. Packard, of Louisiana, as well as to officials in California and Oregon, urging them to hold their states—that the election depended upon it. The next difficulty was to find an open telegraph office, and for some time Reid and Chandler clattered wildly about town in a hired hack. Finally the telegrams went out, charged to the account of the *New York Times*. Later in the morning the *Times*, and in its wake, Zach Chandler, boldly claimed the election for Hayes.

What the result would have been if Democratic headquarters had not sent their indiscreet inquiries to the *Times*, no one will ever know. The original returns in both Florida and Louisiana gave a majority to Tilden. Either state was sufficient to elect him and, if left alone, both might have been conceded. As it was, it required strenuous adjustments to switch them to Hayes. Would these adjustments have been made if the *Times* had not intervened? Taking liberties with election returns is risky business and becomes a serious crime if one ends up on the losing side.

"Statesmen" to the Rescue

Once alerted, the Republicans leapt into action. National Chairman Zach Chandler used Jay Gould's private wire to reach President Grant, then celebrating the Centennial of Independence in Philadelphia. At Chandler's request, troops were dispatched to the capitals of the contested states and prominent politicos were rushed there to oversee the canvass.

President Grant was amiable and cooperative. It did not occur to him, initially, to ask anyone but partisan Republican leaders to monitor the fairness of the count. The Democrats had other notions, and quickly sent their own people to oversee the overseers. Some bright newspaper man nicknamed all these Republican and Democratic worthies the "Visiting Statesmen".

The election machinery in Florida and Louisiana, as well as in South Carolina, was controlled by the Republicans. The only way the Democrats could influence an official was to buy him. This they set out to do. Although the top dignitaries of the party denied

complicity, the later deciphering of telegrams showed that prices had been quoted and that in one case headquarters in New York had authorized as much as $75,000. But such efforts proved futile. If the Democrats bought anyone who could swing an electoral vote, he did not stay bought.

The Republicans were more successful in maintaining their purity, or at least their privacy. Although the telegraph companies kept copies of Democratic telegrams, those of the Republicans were conveniently destroyed. In any event, the Republicans' situation was much simpler. To the election officials the personal consequences of defeat would be so dire that they had no choice but to sink or swim with the party. That there may have been other inducements as well is indicated by the fact that virtually all the Republican "Visiting Statesmen" and key election officials later received lucrative appointments, ranging from thousand-dollar-a-year sinecures to ambassadorships.

Although the Republicans held the inside track, they had a long way to go. They had to clinch all the electoral votes of all the contested states. The Democrats needed only to hold or disqualify a single contested elector. If they could capture one, they would have a majority; if they could disqualify one, the election would move into the House of Representatives, which they controlled.

The Constitutional Requirements

The United States Constitution provides that presidential electors shall be appointed or elected in each state and shall vote there by ballot for President and Vice President. They are then required to certify the persons voted for and to transmit their sealed certificates to the President of the U. S. Senate, who "shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted".

If, on such count, no person has a majority of the whole number of electors, the House of Representatives is required to choose the President, and the Senate the Vice President, from among the three persons having the highest number of electoral votes.

In 1876, after the canvass had been completed and the electoral certificates assembled, the States in which there was no serious contest stood:

Tilden, 184; Hayes, 163.

The contested electoral votes were:

Florida	4
Louisiana	8
Oregon	3
South Carolina	7
	22

The number required for a majority was 185.

The President of the Senate was Thomas W. Ferry, of Michigan, a thoroughgoing Republican. To the extent that the decision was within his power, Hayes was considered safe. The House, on the other hand, had a Democratic majority. If it could control the decision, Tilden would be elected.

The Precedents

Tilden was first and foremost a lawyer. It was characteristic that he approached the issue as a legal problem. With the help of his friend John Bigelow, he made an exhaustive analysis of each case in which an electoral vote had been questioned during the hundred years of American constitutional history. His studies showed that all prior contests had been determined by the two houses of Congress and that the decision had never been left to the President of the Senate.

Chancellor Kent, in his *Commentaries*, had said that such questions should be decided by the President of the Senate, but other eminent authorities, as well as consistent practice, were to the contrary. From 1865 until 1876, furthermore, the matter had been governed by a joint rule, known as Rule 22, providing that either house could reject disputed electoral votes. As recently as 1873, electors of Louisiana had been rejected by vote of the two houses, acting separately, and electors of Arkansas by vote of the Senate alone. Early in 1876, however, after the House had gone Democratic, the Senate had unilaterally terminated Rule 22, realizing that it would enable the House to control an election by the simple expedient of refusing to recognize electors and then electing the President itself.

It seemed clear to Tilden that the settled practice of handling disputed electoral votes should have the force of law. Accordingly, the House of Representatives need only stand its ground and insist on an active part in the count. This would either give him a majority or throw the election into the House for lack of a majority.

The Republicans, on the other hand, exhibited something less than enthusiasm for Tilden's masterly analysis. There always has to be a first time for anything, and they had little difficulty convincing themselves that this was the proper first time for the President of the Senate to count the disputed votes.

It is interesting to speculate as to the outcome if both parties had stood their ground, as their leaders wanted. The Republicans had control of the Army, but the Democrats could cut off its funds and in fact did. Neither wanted the onus of starting a conflict, but Tilden was confident the Republicans would back down if it came to an impasse, and this view was shared by some of the Republican big wigs. Senator James G. Blaine, who had been a prominent contender for the 1876 nomination and who was to be the Party's standard bearer in 1884, later said that if the Democrats had been firm the Republicans had no alternative but to yield. But Tilden's appeal was to the mind rather than to the heart. He did not inspire enthusiasm and when, after election day, he secluded himself to analyze the precedents, it was attributed to want of leadership. His supporters felt free to go their own way.

What the rank and file demanded was action. Democratic hotheads shouted that they would march on Washington. One mentioned 40,000 followers, another upped the ante, and before long no self-respecting politico could afford to claim less than 100,000 riflemen at his back. After this lost its novelty, Northern Democrats assured the world that their Southern brothers would rise in arms against any move to deny them the Presidency. This, despite the fact that no Southern leader of consequence had any notion of going to war over the election. Rifle clubs and the Ku Klux Klan were all right for keeping ex-slaves in their proper

place, which was mostly away from the polls, but the South had suffered too grievously to think seriously of further fighting. The threats came mostly from those who had not fought and who would have been the first to vanish at the sound of shooting.

But though Tilden and other realists scoffed at the idea of armed conflict, the threats and clamor had an alarming effect on the public. There was a wave of feeling that something must be done, and done promptly, to avert calamity. On December 7, 1876, Congressman McCrary, of Iowa, introduced a resolution for the appointment of committees of the House and Senate to work out a solution. This quickly passed both Houses and seven leading members of each were named, equally divided in total between the parties.

The Electoral Commission

There was a gradual crystallization of opinion in favor of some form of arbitration by members of the Supreme Court. The House committee proposed a commission consisting of five Justices. The Senate committee advocated a joint commission of Justices, Senators and Representatives. It was, perhaps, unfortunate that the House plan was not adopted. It would have permitted the Justices to conduct their deliberations by themselves, in a judicial atmosphere. The Senate plan, on the other hand, made them minority members of a highly partisan legislative group, and forced their opinions to be formed and expressed in meetings dominated by party leaders.

The absorbing problem, however, was how to select the five Justices. Impartiality seems to have been a minor consideration and it was freely assumed that the Justices would be biased. Only two members of the court were Democrats, Clifford, of Maine, appointed by Buchanan, and Field, of California, appointed by Lincoln. The other seven were appointees of either Lincoln or Grant, and six of them were considered strongly Republican. Only one, David Davis, of Illinois, seemed doubtful.

Justice Davis was a man of such monumental bulk that, when buying clothes, it was said he had to be surveyed. He had been a close personal friend of Lincoln and was generally given credit for his nomination at the Republican convention of 1860. He was, however, out of sympathy with the Radicals who now dominated the Party, and they had denounced him for his opinion in *Ex parte Milligan*, holding that a civilian could not be prosecuted before a military tribunal so long as the civil courts were open and available. This was a severe blow to military enforcement of Reconstruction in the Southern states, and was bitterly assailed by the Radicals.

Davis was at heart a politician and he thirsted for the Presidency. He had sought the nomination of the Liberal Republican Party in 1872, but lost to Horace Greeley. He had been a leading but unsuccessful candidate for nomination by the Greenback Party in 1876. He had not voted in the election itself and no one knew precisely where he stood, but it was the Democrats who chiefly extolled his impartiality. The Republicans were afraid of him. Senator Edmunds, of Vermont, said, "Judge Davis is one of those independents who stand always ready to accept Democratic nominations."

For some time the House and Senate committees could not agree upon the composition of the proposed electoral commission, or, more particularly, upon how the odd man should be chosen. Drawing lots was seriously considered until Tilden declared that "he might lose the presidency but he would not raffle for it". Finally, when the impasse seemed hopeless, Congressman Henry Barton Payne, of Ohio, Chairman of the House Committee, entertained the entire group in his private sitting room at the Riggs House. There was a generous collation and under the genial influence of food and spirits a compromise was effected.

It was agreed that the commission would consist of five Senators, five Representatives, and five Justices. The congressional membership would be divided equally between Democrats and Republicans and the problem of the odd man would be solved by designating four Justices, Democrats Clifford and Field and Republicans Miller and Strong, and leaving it to them to select the fifth. It was the understanding of all concerned, including the four Justices, that the odd man would be David Davis.

Walker Lewis is a member of the Maryland and District of Columbia Bars. A graduate of Princeton (A.B. 1925) and of the Harvard Law School (LL.B. 1928), he is a member of the American, Maryland, District of Columbia and Baltimore Bar Associations.

Neither presidential candidate wanted an electoral commission. Both preferred to stand their ground rather than submit to the unpredictability of arbitration. Hayes, furthermore, foresaw that the proposed electoral commission would place the Democrats in a position to stall the count and to prevent final action by March 4. On that date the powers of the existing Congress would expire. If no President had been counted in by that time it would be difficult to resist the right of the new House of Representatives to elect, and the new House, like its predecessor, would be Democratic.

Popular pressure overrode the wishes of the candidates and the Electoral Commission Bill was adopted in the form worked out by the joint committee. But it was passed primarily as a Democratic measure, the division in Congress being:

	For	*Opposed*
Democrats	184	19
Republicans	54	84

The Democratic leaders in Congress were jubilant. They did not believe that Justice Davis would shut his eyes

to the Republican adjustments in Florida and Louisiana which had converted initial majorities for Tilden into majorities for Hayes.

Republican support of the bill, such as it was, is more difficult to fathom. Primarily, the reason was President Grant. In the absence of a legislative compromise one of two things must happen. Either there would be no president on Inauguration Day, March 4, or there would be two, one counted in by the President of the Senate and the other elected by the House of Representatives. In either event the crisis would fall into the lap of President Grant. If he used his power to place Hayes in the Presidency, or to continue himself, a large portion of the public would consider it a theft of the office. If, on the other hand, he supported Tilden, his own party would everlastingly despise him as a traitor.

President Grant's closest friend in Congress was Senator Roscoe Conkling, of New York. There is reason to believe that the original plan for the Electoral Commission was worked out by Grant and Conkling and that it was forced upon the Republican leaders. In this, Conkling was not without ulterior motive. He disliked Hayes, and was a bitter personal enemy of William A. Wheeler, of New York, the vice presidential candidate. But it was President Grant himself who seems to have carried the day. When he let it quietly be made known to key Republican senators that he did not believe Hayes had won the election and would not use the power of the Presidency to force his installation in office, the opposition wilted. Of all the staunch Republicans on the Senate committee, only Morton of Indiana refused to sign the report recommending the creation of the Electoral Commission.

Thus was the bill passed by both the Republican Senate and the Democratic House of Representatives. But meanwhile other events were transpiring in Illinois, where a bitter fight was being waged to unseat Republican Senator James A. Logan. Prior to the Seventeenth Amendment, United States Senators were elected by their state legislatures and in this instance the Republicans and Democrats were deadlocked.

It will be recalled that one of the parties in the 1876 election was the National Independents, or Greenbackers. It had won no electoral votes, but five of its local candidates had gained seats in the Illinois legislature. There they held the balance of power. The local Democrats now saw an opportunity to use Justice David Davis, a leading Greenbacker, as a means of defeating Logan. They joined with the five independents and elected Davis to the Senate. This event took place on January 25, 1877, the day before the House of Representatives voted on the Electoral Commission Bill, but news of it did not reach Washington until after the bill had been passed and sent to the President for approval.

The Chairman of the Democratic National Committee was Congressman Abram S. Hewitt, a wealthy industrialist and a friend of Tilden. He had urged adoption of the Electoral Commission Bill and had sought to reconcile Tilden to it on the basis of Justice Davis's background and sympathies. He later wrote, in what he called his "Secret History":

> The general feeling was that victory was won, because no one doubted for a moment that Judge Davis would be selected as the fifth member of the Commission... An analysis of the vote proves that the bill was regarded as a Democratic measure and that a large majority of the Republicans in Congress were opposed to its passage... I thought at the time and I still think that the division of the parties on this measure was largely controlled by the conviction that Judge Davis would have the casting vote, and that he could be relied upon to see that the will of the people as expressed in the election of Mr. Tilden should not be thwarted.

Hewitt did not learn of Davis's election until after the Bill had passed. The news was given him by Milton H. Northrup, secretary of the House Committee, who later wrote that he would "never forget the drop in the countenance of the Hon. Abram S. Hewitt ... when he informed him of Judge Davis's transfer from the Supreme Court to the Senate".

Davis would remain a member of the Supreme Court until March 4, and he was asked to accept a place on the Electoral Commission as planned. Justice Clifford and others pleaded with him to do so. But he had no more desire to be saddled with the fate of the Presidency than did Grant. Election to the Senate had opened an escape, and thereafter wild horses could not have dragged him to a place on the Commission.

All the remaining untapped members of the Supreme Court were Republicans, and the Democrats would have liked to call the whole thing off. But the die was now cast. After some fruitless bickering the four Justices chose Justice Joseph P. Bradley, of New Jersey, to be the fifth.

Hayes was at his home in Columbus, Ohio, awaiting events. According to his diary, at 2:00 P.M. on January 31 his son Webb rushed into the house with the news: "The judge, it is Bradley. In Washington the bets are five to one that the next President will be Hayes."

(This is the first of two parts; the second will appear next month.)

The Careful Draftsman and the Problem of Age

Such legal phrases as "attain the age of 21 years" and "between the ages of 17 and 45" sound deceptively clear, but Mr. Cantrall warns that they may present more of a conundrum than the old problem, "How old is Ann?" He offers some advice on how to word such expressions in legal documents.

by Arch M. Cantrall • *of the West Virginia Bar (Clarksburg)*

"AGE. THE full age of twenty-one years is held to be completed on the day preceding the twenty-first anniversary of birth. I Blackstone, Comm. 464." Bouvier's Law Dictionary, page 99.

This is based on the fact that a person is one year old on the day before his first birthday, counting the day of birth as the first day. Thus, on a person's first birthday, he is starting his second year of life, the first year having been completed on the day before. On his first birthday, the first day of his second year of life, is he "over one year of age"? Obviously so.

A "birthday" is an anniversary, the yearly recurring day, in this case being the same calendar day each year as the day of birth.

Courts have reached various results on various facts and for various purposes, for example as given in *Words and Phrases* (read these in the light of the common law rule):

"Attain": A person does not attain the age of 15 until his 15th birthday. *Watkins* v. *Metropolitan Ins. Co.*, 131 P. 2d 722, 156 Kan. 27.

"Attained age": A person past his 54th birthday is 54 until he has reached his 55th birthday. *New York Life Ins. Co.* v. *Fed. Nat. Bk.*, C. C. A. Okl. 143 F. 2d 69, 72.

"Full age": A person is of full age on the day preceding the 21st anniversary of his birth. *Hamlin* v. *Stevenson*, 34 Ky. (4 Dana) 597.

"Over age of 65 years": This phrase inapplicable to persons who have not reached their 66th birthday, fractions of year not being considered. *Wilson* v. *Mid-Continent Life Ins. Co.*, 14 P. 2d. 945, 159 Okl. 191, 84 A.L.R. 386 (annotated at 389).

In this annotation *Grant* v. *Grant* (1840) 4 Younge & C. Exch. 256, 160 Eng. Reprint 1001, is stated to have held that a will provision that money was to be paid to a person "on the day she attains her 25th year, and not until then" means the day she became *24* years old.

"Over age of 60 years": Death at 60 years and 2 months held to have been "over" the age of 60 years. *Bay Trust Co.* v. *Agricultural Life Ins. Co.* 271 N.W. 749, 279 Mich. 248.

"Over the age of 45 years": Not until he reaches his 46th birthday. *Allen* v. *Baird*, 188 S.W. 2d. 505, 208 Ark. 975.

"Year—number of days": One born on the first day of the year is one year old on the 365th day after his birth —the last day of that year. *Erwin* v. *Benton*, 87 S.W. 291 (Ky.).

"16 years of age or under" excludes children who have passed beyond their 16th birthday. *Gibson* v. *People*, 99 P. 333, 44 Colo. 600.

This sampling of judicial views illustrates the dangers of expressions such as those given above. Contributing to the variations are the common notions that a person is one year old on his first birthday, and that he remains one until his second birthday. Also contributing are such rules of construction as ignoring a fraction of a year, or of a month or of a day. It all depends. There is similar danger of creating an opportunity for uncertainty and argument, and perhaps for judicial interpretation, in expressions such as—

"Between the ages of 17 and 45": From the 17th or the 18th birthday, or from the day before either, to the day before the 45th birthday, or to the 45th birthday, or to the 46th?

"17 years of age or older and under 46": From the day before his 17th birthday, until the first moment of the day before his 46th?

Arch M. Cantrall practices law in Clarksburg, West Virginia. He served as Chief Counsel of the Internal Revenue Service for nineteen months and is a former President of the West Virginia State Bar.

"Over 17 years of age": At 12:01 A.M., the morning of his 17th birthday? Or not until he reaches his 18th?

"Under 46 years of age": Not more than 45 years and 364 days old?

Internal Revenue Service Regulations §1.151-1(c)(2) provides "For the purposes of the old-age exemption, an individual attains the age of 65 on the first moment of the day preceding his sixty-fifth birthday."

When the careful draftsman finds varying views, judicial or commonly held, on the meaning of a word or phrase, he will try to find another word or phrase of more precise meaning. Here one solution is to abandon the whole idea of years and age, and to write in terms of birthdays, as shown in the table below.

Don't Say	Say
"at the time of my death under the age of 21 years"	"at the time of my death not having reached his twenty-first birthday"
"attain the age of 21 years"	"attain his twenty-first birthday"
"when the survivor or survivors of said children are 21 years of age or older"	"when the survivor or survivors of said children have reached or passed their twenty-first birthdays"
"persons between the ages of 17 and 45"	"persons who have reached their 17th birthdays but not their 46th birthdays"
	unless you mean
	"persons who have reached their 18th birthdays but not their 45th birthdays"

Association Calendar

Annual Meetings

St. Louis, Missouri	August 7-11, 1961
San Francisco, California	August 6-10, 1962

Board of Governors Meetings

Midyear Meeting, Chicago, Illinois	February 15-16, 1961
Board of Governors and Conference of Bar Presidents	February 17, 1961
Spring Meeting, Washington, D.C.	May 15-16, 1961

Midyear Meeting

Edgewater Beach Hotel, Chicago	February 15-21, 1961
Group Meetings	February 17, 18 and 19, 1961
House of Delegates	February 20-21, 1961

Regional Meetings

Indianapolis, Indiana	May 10-13, 1961
Birmingham, Alabama	November 9-11, 1961

There Is No "General Welfare Power" in the Constitution of the United States

Examining the history of the Constitution and the debates that surrounded its adoption by the original thirteen states, Mr. Nilsson concludes that there is no general welfare clause in the Constitution. He warns that widespread acceptance of the "general welfare" doctrine threatens our liberties.

by George W. Nilsson • *of the California Bar (Los Angeles)*

THE CONSTITUTION of Vermont reminds us:

> . . . that frequent recurrence to fundamental principles and a firm adherence to justice, moderation, temperance, industry and frugality are absolutely necessary to preserve the blessings of liberty and keep government free.

I

In addition to the threats of danger from outside of the United States, and subversion within, the constitutional republic of the United States is being threatened by the concentration of power in the Federal Government in spite of, and contrary to, the "checks and balances" of the Constitution.

Much of such concentration has been due to two World Wars and the Korean War, but more especially by twisting out of shape the interstate commerce clause of the Constitution, (Article I, Section 8, Clause 3), using taxing power for punitive purposes instead of for raising revenue as authorized, and by misusing the general welfare clause.

More and more power is being seized by, or surrendered to, the Federal Government under the guise of the alleged general welfare clause of Article I, Section 8, Clause 1 of the Constitution, which contains the following language:

> The Congress shall have power to lay and collect taxes, duties, imposes and excises, to pay the debts and provide for the common defense and general welfare of the United States . . .

This clause is followed by sixteen other clauses specifying the various powers of Congress—Clause 2, to borrow money; Clause 3, to regulate foreign and interstate commerce, etc; then Clause 18 gives the Congress power "to make laws necessary to carry into execution the foregoing powers". This last clause would have been unnecessary if Clause 1 gave "general welfare power".

For 140 years it was generally recognized that the quotation from Clause 1 was not a grant of "general welfare power". Many Presidents vetoed acts passed by Congress for that reason.

For instance, President Andrew Jackson, when he vetoed a bill for public improvements, stated:

> We are in no danger from violations of the Constitution from which encroachments are made upon the personal rights of the citizen . . . But against the dangers of unconstitutional acts which, instead of menacing the vengeance of offended authority, proffer local advantages and bring in their train the patronage of the government, we are, I fear, not so safe.

Early in the 1930's some individual "discovered" that the clause granted "general welfare power", and more and more this has been used to pass legislation based solely on this alleged grant of general welfare power.

The rush to pass "welfare" legislation for various pressure groups calls to mind an item in the joke column of *Pay Dirt*, a mining magazine published in Phoenix, Arizona, (unfortunately, it is more tragic than humorous):

> If a politician tries to buy votes with private money he is a dirty crook; but if he tries to buy them with the people's own money, he's a great liberal.

As an illustration of how this alleged "welfare" clause is being misused, here is a quotation from a resolution passed June 15, 1959, at the conference of mayors held in Los Angeles, requesting additional federal funds for urban renewal. It begins as follows:

> WHEREAS, The redevelopment of the blighted and deteriorating sections of American cities is vital to the welfare and prosperity of the entire nation . . .

This, of course, is not a statement of fact but is a self-serving declaration, because the deterioration of cities is due to the failure of the cities to enforce their building and health regulations, and its correction is purely a local matter. That statement is just as

illogical as to say that this article is printed with white ink on black paper.

On July 8, 1960, during the Democratic Convention at Los Angeles, the newspapers reported that the mayors of five substantial cities had appeared before the Democratic Platform Committee and requested a statement in the platform recommending the establishment in the Federal Government of a "Department of Urban Affairs" which would have jurisdiction over "such problems as inadequate housing, residential and industrial slums, double shift schools, inefficient mass transit systems, congested streets, water shortages and sewage disposal".

Every one of these problems is purely local. If the local communities are unable to take care of them, that tragic conclusion is an acknowledgement that the people are unable to govern themselves, and that the principles stated in the Declaration of Independence, the Constitution and the Bill of Rights are incorrect. With such a hypothesis no American lawyer will agree.

When the Constitution was completed and ready to be signed, Benjamin Franklin made a speech in the course of which he said:

> I think a General Government necessary for us, and *there is no form of government, but what may be a blessing to the people if well administered;* and believe further, that this is likely to be well administered for a course of years, and *can only end in despotism, as other forms have done before it, when the people shall become so corrupted as to need despotic government, being incapable of any other.*

Rules for Interpretation

There is a general rule of law that where the statement of a general proposition is followed by specific provisions, the latter prevail. This rule is stated by James Madison in *Federalist Paper* No. 41 and by Alexander Hamilton in *Federalist Paper* No. 83, (quoted in Sections V and VI below). It is applied by Mr. Justice Story to Article I, Section 8 of the Constitution, enumerating the powers of Congress, in his book on the Constitution in Sections 909, 910 and 911. He shows that by Clauses 2 to 17, inclusive, specific powers limit Clause 1, referring to general welfare. Section 910 reads in part:

> 910 . . . Nothing is more natural or common than first to use a general phrase, and then to qualify it by a recital of particulars. But the idea of an enumeration of particulars, which neither explain, nor qualify the general meaning, and can have no other effect than to confound and mislead, is an absurdity which no one ought to charge on the enlightened authors of the Constitution. It would be to charge them either with premeditated folly or premeditated fraud.

Another yardstick to be used in determining the meaning of the general welfare clause is discussed below in Section VI; *i.e.*, that the powers delegated to the United States by the Constitution are few, defined and limited.

Here let us read a relatively modern statement of that rule:

Justice Frankfurter, in the opinion in *Polish Alliance* v. *National Labor Relations Board*, 322 U.S. 643, 650 (1943), said:

> The interpenetrations of modern society have not wiped out state lines. It is not for us to make inroads upon our federal system either by indifference to its maintenance or excessive regard for the unifying forces of modern technology. Scholastic reasoning may prove that no activity is isolated within the boundaries of a single state, but that cannot justify absorption of legislative power by the United States over every activity.

II

Common Sense and Logic—Climate of Opinion in 1787

In 1787, when the Constitution was adopted, the colonists had been through eight years of war and four years of "a critical period". Knowing what led up to the war, and reading the charges in the Declaration of Independence, can anyone for a minute think that the colonists generally, and the members of the convention specifically, would have adopted a constitution which granted general welfare powers to the Federal Government?

The resistance to the adoption of the Constitution, which will be discussed hereafter, shows what the people generally felt.

This is summarized by Albert J. Beveridge in his great biography, *The Life of John Marshall*, in Volume I, Chapter 10, where he writes about the convention called in the State of Virginia for the purpose of discussing the ratification of the proposed United States Constitution. At page 371 he describes the general feeling of the people about a strong central government in these words:

> They [who resisted the Constitution] had on their side the fears of the people who, as has appeared, looked on all government with hostility, and on a great central Government as some distant and monstrous thing, too far away to be within their reach, too powerful to be resisted, too high and exalted for the good of the common man, too dangerous to be tried. It was, to the masses, something new, vague and awful; something to oppress the poor, the weak, the debtor, the settler; something to strengthen and enrich the already strong and opulent, the merchant, the creditor, the financial interests.
>
> True, the people had suffered by the loose arrangement under which they now lived; but, after all, had not they and their "liberties" survived? And surely they would suffer even more, they felt, under this stronger power; but would they and their "liberties" survive its "oppression"? They thought not.

Thomas Jefferson made the same point in a letter in 1823:

> I have been blamed for saying that a prevalence of the doctrine of consolidation would one day call for reformation or revolution. *I answer by asking if a single State of the Union would have agreed to the Constitution had it given all powers to the General Government? If the whole opposition to it did not proceed from the jealousy and fear of every State* being subjected to the other States in matters merely its own? And also is there any reason to believe the States more disposed now than then to acquiesce to this general surrender of all their rights and powers to a consolidated government, one and undivided? [Italics added.]

On February 16, 1783, four years before the Constitutional Convention, Pelatiah Webster published a pamphlet containing his idea of a proposed constitution for the United States. The whole draft can be found in *The Origin and Growth of the American Constitution*, by Hannis Taylor, in an appendix beginning at page 529. In para-

graph 7 of his proposed Constitution, Pelatiah Webster says:

> I propose further that the powers of Congress, and all other departments acting under them, shall all be restricted to such matters only of *general necessity and utility to all the States as cannot come within the jurisdiction of any particular State, or to which the authority of any particular State is not competent*, so that each particular State shall enjoy all sovereignty and supreme authority to all intents and purposes, excepting only those high authorities and powers by them delegated to Congress for the purposes of the general union. [Italics added.]

III
Articles of Confederation

Article VIII of the Articles of Confederation begins with the following language: "All charges of war and of expences that shall be incurred for the common defence and general welfare . . ."

James Madison pointed out in a letter to Edmund Pendleton, dated January 21, 1792, that the "general welfare clause" had been copied from the Articles of Confederation, and then said:

> . . . Where it was always understood as nothing more than a general caption to specific powers, and it is a fact that it was preferred in the new instrument for that very reason as less than any other to misconstruction [See *Jefferson and Madison*, by Adrienne Koch, pages 128 and 129, and Irving Brant's *Madison*, Volume 3, "Father of the Constitution", page 138.]

IV
Debates in the Constitutional Convention

A summary of the day-by-day proceedings of the Constitutional Convention of 1787 is found in Charles Warren's book *The Making of the Constitution.*

From a study of the records of the Convention, it will appear that from time to time efforts were made by some delegates to have the Constitution grant broad general powers to the Federal Government. Each time such proposal was advanced, it was rejected.

Beginning on page 464 is a discussion of "The Taxing Power and the General Welfare Clause". At page 474 occurs this statement:

> . . . In Governor Livingston's Committee Report of August 21, these words had been used with reference to prior debts, and merely described them as having been incurred during the late war "for the common defense and general welfare" . . .

On page 475 Mr. Warren says:

> . . . Some words evidently had to be added that would make clear the power of Congress to levy taxes *for all the National purposes set forth in the grants of power subsequently specified in this section.* Evidently the Committee selected these words, "to provide for the common defence and general welfare", as comprising all the other purposes for which Congress was to be empowered to levy and collect taxes. *They selected these words as embracing all the subsequent limited grants of power which the Committee of Detail, in its Report of August 6, had specified as constituting that amount of common defence and general welfare which the National Government ought to control and as to which ought to have power of legislation.* In other words, the phrase "to provide for the general welfare" *is merely a general description of the amount of welfare which was to be accomplished by carrying out those enumerated and limited powers vested in Congress—and no others.* [Italics added.] [See also *James Madison* by Irving Brant, Volume 3, *Father of the Constitution*, Chapter 10, beginning at page 132, which is entitled "General Power or Enumeration".]

V
Debates in the Various States for the Adoption of the Constitution

History tells us that in 1787 there was great opposition to the adoption of the proposed new Constitution. As a matter of fact, it squeaked through by a very few votes in a number of states. For instance, Massachusetts 187 to 168, Virginia 89 to 79, and New York 30 to 27, and then only on condition that a Bill of Rights be added.

The *Federalist Papers* were written by Alexander Hamilton, James Madison and John Jay in support of the adoption of the Constitution, principally in connection with the debates in New York, where there was strong opposition to the adoption of the Constitution.

In *Federalist Paper* No. 41, James Madison said (after pointing out the objections to the clause ". . . to raise money for the general welfare . . ."):

> *But what color can the objection have, when a specification of the objects alluded to by these general terms immediately follows, and is not even separated by a longer pause than a semicolon?* If the different parts of the same instrument ought to be so expounded, as to give meaning to every part which will bear it, shall one part of the same sentence be excluded altogether from a share in the meaning; and shall the more doubtful and indefinite terms be retained in their full extent, and the clear and precise expressions be denied any signification whatsoever? *For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power?* Nothing is more natural or common than first to use a general phrase, and then to explain and qualify it by a recital of particulars. [Italics added.]

VI
Federal Government Given Only Limited Powers

In considering the question of whether this "general welfare" clause of Article I, Section 8, Clause 1 is a grant

George W. Nilsson has practiced in Los Angeles since 1924. A native of Chicago, he is a graduate of Northwestern University Law School. Mr. Nilsson practiced in Arizona from 1915 to 1924. A member of the Association's Committee on American Citizenship, he has been active in the work of the Section of Mineral and Natural Resources Law as well as in many service and fraternal organizations.

of power, we must also remember that the powers granted to the Federal Government were few and defined. James Madison, in *Federalist Paper* No. 45, said:

> The *powers* delegated by the proposed Constitution to the Federal Government are *few and defined*. Those which are to remain to the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiations and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the *lives, liberties* and *properties* of the people, and the *internal order, improvement* and prosperity of the State. [Italics added.]

Alexander Hamilton, himself, who argued in the Constitutional Convention for general instead of particular enumeration of powers, nevertheless said in *Federalist Paper* No. 83:

> . . . The plan of the Convention declares that the power of Congress or, in other words, of the "national legislature", shall extend to certain enumerated cases. *This specification of particulars evidently excluded all pretension to a general legislative authority, because an affirmative grant of special powers would be absurd, as well as useless, if a general authority was intended.* [Italics added.]

Since the people were persuaded to adopt the Constitution on the basis that the Federal Government was being given only limited and specified powers, how dare anyone, in good conscience, now take the position that the words "general welfare" give the Federal Government unlimited power?

This principle was restated by Franklin D. Roosevelt on March 2, 1930, while he was Governor of New York, in a speech which was entitled "An Address on State Rights" (Collected Papers, Volume I, page 569). He said in part:

> The preservation of this home rule by the states is a fundamental necessity if we are to remain a truly united country . . . to bring about government by oligarchy masquerading as democracy it is fundamentally essential that practically all authority and control be centralized in our national government, the individual sovereignty of our states must first be destroyed . . .
>
> We are safe from the danger of any such departure from the principles upon which this country was founded just so long as the individual home rule of the states is scrupulously preserved and fought for whenever they seem in danger. Thus it will be seen that this home rule is a most important thing—a most vital thing if we are to continue along the course on which we have so far progressed with such unprecedented success.

VII
The Effect of the Bill of Rights

In many of the states, the Constitution was adopted only when it was accompanied by a resolution demanding that a Bill of Rights be added to the Constitution. If the people of the various states were satisfied with the Constitution as written, they certainly would not have demanded the added protection of the Bill of Rights.

As pointed out in "II" above, certainly no state would have adopted the Constitution if the Congress had been given *carte blanche* to pass any law or do anything which it desired or which it felt was for the "general welfare".

This demand for a Bill of Rights, therefore, should be sufficient to prove that the Constitution, and particularly Article I, Section 8, Clause 1, did not grant general welfare power to the Federal Government.

True to his promise, James Madison, in the First Congress, which met in 1789, caused to be passed a Bill of Rights containing twelve sections, ten of which were adopted and went into effect December 15, 1791.

This Bill of Rights, and particularly the Ninth and Tenth Amendments, are further and conclusive proof that the clause that we are discussing did not grant any authority to the Federal Government to pass any laws based on "general welfare powers".

VIII
Statements by Contemporaries After Adoption of the Constitution

On December 5, 1791, Secretary of the Treasury Alexander Hamilton presented to the Congress his "Report on Manufactures".

Madison delivered an address in Congress against the Report, in which he said in part:

> If Congress can apply money indefinitely to the general welfare, and are the sole and supreme judges of the general welfare, they may take the care of religion into their own hands; they may establish teachers in every State, county and parish, and pay them out of the public Treasury; they may take into their own hands the education of children, establishing in like manner schools throughout the Union; they may undertake the regulation of all roads, other than post roads. In short, everything, from the highest object of State legislation, down to the most minute object of policy, would be thrown under the power of Congress; for every object I have mentioned would admit the application of money, and might be called, if Congress pleased, provisions for the general welfare.

The report was pigeonholed, the first major defeat for one of Hamilton's most cherished policies. (*Jefferson and Madison*, by Adrienne Koch, page 129.)

Further on the same question, James Madison, on January 1, 1792, in a letter to Henry Lee, Governor of Virginia, said in part:

> What think you of the commentary . . . on the term "general welfare"? . . . The federal government has been hitherto limited to the specified powers, by the Greatest Champions for Latitude in expounding those powers . . . *If not only the means, but the objects are unlimited, the parchment had better be thrown into the fire at once.* [Italics added.]

And in a letter to Edmund Randolph (January 21, 1792), said:

> *If Congress can do whatever in their discretion can be done by money, and will promote the general welfare, the government is no longer one possessing enumerated powers, but an indefinite one subject to particular exceptions.* [Italics added.] [*Jefferson and Madison*, by Adrienne Koch, page 128.]

Thomas Jefferson had the same views. He wrote to Albert Gallatin in 1817, about the General Welfare Clause, of which he said:

> You will have to learn that an act for internal improvement, after passing

both Houses, was negatived by the President. The act was founded, avowedly, on the principle that the phrase in the Constitution which authorizes the Congress "to lay taxes, to pay the debts and provide for the general welfare", *was an extension of the powers specifically enumerated to whatever would promote the general welfare; and this, you know, was the Federal doctrine.* Whereas our tenet ever was, and, indeed, it is almost the only landmark which now divides the Federalists and the Republicans, that Congress had not unlimited powers to provide for the *general welfare, but was restrained to those specifically enumerated;* and that, as it was never meant that they should provide for that welfare but the exercise of the enumerated powers, so it could not have meant that they should raise money for purposes which the enumeration did not place under their action; consequently, that the specification of powers is a limitation on the purposes for which they may raise money. [Italics added.] [See *Undermining the Constitution,* by Thomas James Norton, page 191.]

Abraham Baldwin, a member of the Constitutional Convention, while a member of Congress, on June 17, 1798, said in the Congress:

> . . . to provide for the common defence and general welfare had never been considered as a source of legislative power, as it is only a member introduced to limit the other parts of the sentence. [*Undermining the Constitution,* by Thomas James Norton, page 189.]

Conclusion

(a) In a book recently published, analyzing some of the decisions of the modern Supreme Court, the writer says: "Enthroned at last, were Hamilton's bold nationalistic views . . ."

To say these modern ideas of "general welfare power" are those of Alexander Hamilton is to malign him. Alexander Hamilton was a great patriot and statesman. His ideas of a new government were far different from those embodied in the Constitution, but after the Constitution was adopted, he faithfully and enthusiastically supported it. For instance, he wrote most of the *Federalist Papers.*

Even though Alexander Hamilton had espoused such ideas as are now ascribed to him, such ideas were not accepted as part of the Constitution as finally adopted and, therefore, must not be used to interpret the Constitution.

Since Alexander Hamilton's views were rejected by the Constitutional Convention of 1787 (not even being referred to a committee, Hannis Taylor, page 200); since Alexander Hamilton was absent from the Convention about one half of the time, once from June 29 to the middle of August, 1787, and since his views against the inclusion of a Bill of Rights were rejected, the foregoing statement that his views are now being accepted is a clear acknowledgement that the spirit and letter of the Constitution as written are now being perverted.

Against this view attention is called to the *Federalist Papers* which are referred to and quoted herein.

It is therefore clear from history, common sense, the records of the Constitutional Convention, the *Federalist Papers,* the debates in the state ratification conventions, and precedents followed for more than 140 years, that THERE IS NO GRANT OF GENERAL WELFARE POWER IN THE CONSTITUTION OF THE UNITED STATES.

(b) While it would seem that such general welfare power is not needed, if it should be determined that it is necessary, then the amending clause of the Constitution should be followed, as was pointed out by George Washington in his Farewell Address:

> . . . If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this in one instance may be the instrument for good, *it is the customary weapon by which free governments are destroyed.* The precedent must always greatly overbalance, in permanent evil, any partial or transient benefit which the use can at any time yield. [Italics added.]

The dire results of undermining the Constitution were pointed out by Daniel Webster in his eulogy of George Washington in 1832, where he said in part:

> Other misfortunes may be borne, or their effects overcome . . .
>
> * * *
>
> *But who shall reconstruct the fabric of demolished Government? Who shall rear again the well-proportioned columns of constitutional liberty?* Who shall frame together the skillful architecture which unites national sovereignty with State rights, individual security and Public prosperity?

(c) Every lawyer when he is admitted to the Bar takes an oath to "uphold, defend and protect the Constitution of the United States".

Since the Constitution is being ignored, misconstrued or by-passed by legislation, by court decisions and by executive action, it is time that fundamental principles of the Constitution be re-examined, and that every citizen, as well as every lawyer, take his place on the battle line in a new crusade to re-establish the principles and the spirit of the Declaration of Independence, the Constitution and the Bill of Rights.

Cuba's Seizures of American Business

In this article, Mr. Allison examines the many legal ramifications of Castro's seizure of American property in Cuba. The article will be concluded in the February issue of the *Journal*.

by Richard C. Allison • *of the New York Bar (New York City)*

WE ARE WITNESSING in Cuba today an economic, social and political convulsion which compares in intensity with the upheavals in Russia after World War I and in the Eastern European countries and China after World War II. The drastic steps being taken by the Castro regime mean not only staggering financial losses for American investors and businessmen but also great personal tragedy for many Cubans.

Each new decree of the Cuban Government brings with it a host of legal problems, and international lawyers and legal scholars are certain to be engaged for many years to come in analyzing the tangled web of rights and liabilities being woven today. The final resolution of these problems may well determine whether the rule of law is to prevail in our time.

It is the purpose of this article to mention some of the Castro Government's principal actions against American businesses in Cuba, to focus attention on a few of the legal problems which they have created, and to review some of the applicable principles of law.

To begin with, let us recall the more important measures affecting American business which have been adopted by the Cuban Government since January 1, 1959.

Constitutional Changes

One of the first acts of the Revolutionary Government was the abandonment of the 1940 Constitution and the substitution in its place of the so-called Fundamental Law of February 7, 1959.[1] In its original form the Fundamental Law was in many respects a reiteration of the 1940 Constitution with the exception that certain of the constitutional guarantees which would have impeded the Revolutionary Government's actions against followers of Fulgencio Batista were modified or suspended.[2] However, the Fundamental Law provides that it can be amended by the Council of Ministers with the approval of the President (Article 232) and this power has been exercised on a number of occasions. Article 24 originally prohibited confiscation of private property (except for that of Batista and of persons guilty of "crimes against the national economy"), and in the case of takings by the state it required prior payment of compensation in cash. Article 24 has now been amended to provide simply that the manner of payment for expropriated property shall be established by law.[3] The constitutional guarantees still remaining in the law must be regarded with a certain skepticism in view of the demonstrated willingness of the Council of Ministers to suspend or alter them to suit particular governmental purposes. For example, in December, 1959, Article 24 was amended to permit the confiscation of the properties of "counter-revolutionaries".[4]

Exchange Controls

Shortly after the Revolutionary Government assumed control, it activated and broadened a system of exchange controls which had previously been dormant. As early as January 28, 1959, the Monetary Stabilization Fund issued a revision of its Instruction No. 4, the basic foreign exchange regulation, subjecting foreign remittances to very tight restrictions. In September, 1959, Law 568 defining illegal monetary transactions was adopted.[5] This law imposed serious penalties for a wide variety of offenses considered to be prejudicial to the Cuban economy. The Cuban bank accounts of foreign residents were frozen and foreign exchange transactions including the arranging of financing abroad were placed under strict governmental control. Any company "presumed to be in violation of the law" could be intervened by the Monetary Stabilization Fund. In December, 1959, the Fund made further important changes in Instruction No. 4[6] and established a comprehensive system of import licensing.

The manner in which the controls have been administered is well known. The most publicized example was the

1. OFFICIAL GAZETTE (Special Edition) of February 7, 1959.
2. *E.g.*, Articles 21, 24 and the Additional Transitory Provisions of the Fundamental Law.
3. Law of Constitutional Reform, OFFICIAL GAZETTE (Special Edition) of July 5, 1960.
4. Law of Constitutional Reform, OFFICIAL GAZETTE (Special Edition) of December 22, 1959.
5. OFFICIAL GAZETTE of September 29, 1959.
6. OFFICIAL GAZETTE (Special Edition) of December 4, 1959.

refusal of the National Bank of Cuba to grant exchange to the oil companies which were importing crude and paying for it in dollars. The exchange backlog in this case alone eventually exceeded $50,000,000.[7]

Intervention by Special Decree

Very shortly after the revolution, the Castro Government embarked on its program of interventions of both Cuban and American businesses. One of the notable early interventions was that of the Cuban Telephone Company on March 3, 1959, pursuant to Law 121 of that date.[8] An interesting aspect of this law, which was limited in its effect to the telephone company, is its detailed analysis of the legal justification for the intervention. This is in stark contrast to the various intervention and expropriation decrees adopted in 1960, which read like criminal indictments.

In theory, at least, intervention is a temporary assumption of control of a business or an asset by the Government necessitated by extraordinary conditions. The business is operated for the account of the owners and ultimately is returned to them when the emergency is over. In this sense the step is not unknown in the United States.[9]

As practiced in Cuba today, however, intervention is frequently preliminary to expropriation.[10] The management is superseded by government-appointed interventors, and the owners lose control completely and usually are cut off from all contact with the intervened company. Because it is not regarded by the government as a taking of property, no consideration is given to compensating the owners. Thus, prolonged intervention is clearly tantamount to confiscation.

Agrarian Reform Law of May 17, 1959

On May 17, 1959, the Cuban Council of Ministers adopted the Agrarian Reform Law,[11] which, according to Fidel Castro, was the fundamental objective of the revolution. Under this law, land holdings in excess of approximately one thousand acres are subject to expropriation for distribution among peasants and workers or for incorporation into collective farms.

The law provides for the payment of compensation to the owners of expropriated properties, but the amount of the payment for the land is to be fixed on the basis of its value on the municipal tax rolls prior to October 10, 1958, and improvements are to be separately evaluated by the National Agrarian Reform Institute. Payment is to be made in twenty-year Cuban Government bonds bearing interest at a rate not in excess of 4½ per cent per annum.

It may be remembered that when Guatemala offered the United Fruit Company similar bonds for lands expropriated in 1953, our State Department notified the Guatemalan Government that this was not an acceptable form of compensation within the standards of "adequate, effective and prompt" payment insisted upon by our Government in cases of expropriation.[12] In protesting against property seizures under the Cuban Agrarian Reform Law, the State Department expressed its support of soundly conceived land reform programs but stated that "their attainment is not furthered by the failure of the Government of Cuba to recognize the legal rights of United States citizens who have made investments in Cuba in reliance upon the adherence of the Government of Cuba to principles of equity and justice".[13]

Labor Interventions

Under Law 647 of November 24, 1959,[14] as amended by Law 843 of June 30, 1960,[15] the Minister of Labor is empowered to intervene businesses in Cuba if in his judgment this is necessary in order to prevent shutdowns and consequent loss of employment. This type of intervention has been widely used.

Oil Company Interventions

In late June and early July of 1960, the American oil companies were intervened on the basis of their refusal to refine Soviet crude oil. The United States Department of State took the unusual step of declaring in a note to the Cuban Government that these interventions were illegal under the laws of Cuba.[16]

Expropriations

On July 6, 1960, the Cuban Government, ostensibly in response to the reduction of Cuba's sugar quota in the United States, adopted Law 851.[17] This law empowers the President and the Prime Minister to order the expropriation of American-owned properties in Cuba. The discriminatory character of the law makes it especially vulnerable to attack on the international level.[18]

Law 851 provides that compensation shall be paid in Cuban Government bonds with a term of not less than 30 years and bearing interest at not less than 2 per cent per annum. This can hardly be considered adequate, effective and prompt compensation. But this is not all. The law contains a proviso that the bonds shall be amortized out of a fund to be set up by the National Bank of Cuba to consist of 25 per cent of the foreign exchange received by Cuba each year from sales of sugar to the United States in excess of 3 million tons at a price of not less than 5.75 cents per pound. Even if normal trade between Cuba and the United States were resumed immediately, this formula would make it virtually impossible for any substantial amount of money to be paid into the fund.

Law 851 specifically states that interest will be paid on the bonds only to the extent that the fund is sufficient to make such payments and it is clear that sinking fund payments will be made only from the fund. The law is ambiguous as to whether the principal

7. 43 Department of State Bull. 141 (July 25, 1960).

8. OFFICIAL GAZETTE of March 4, 1959.

9. See, *e.g.*, *Anderson* v. *Chesapeake Ferry Co.*, 186 Va. 481, 43 S.E. 2d 10 (1947).

10. The words "nationalization", "expropriation" and "confiscation" are all used to signify a taking of property by the state. "Nationalization" usually implies a taking of an entire industry or a basic reorganization of the nation's economy and does not imply either payment of compensation to the owners or failure to pay. "Expropriation" ordinarily means a taking accompanied by the payment of compensation, whereas "confiscation" means a taking without compensation. In this paper, however, "expropriation" is sometimes used where the law in question refers to expropriation and it is not the author's intention that any inference as to compensation be drawn from the use of this term.

11. OFFICIAL GAZETTE (Special Edition) of June 3, 1959.

12. 29 Department of State Bull. 357 (1953).

13. 42 Department of State Bull. 153 (1960).

14. OFFICIAL GAZETTE of November 25, 1959.

15. OFFICIAL GAZETTE of July 6, 1960.

16. 43 Department of State Bull. 141 (July 25, 1960).

17. OFFICIAL GAZETTE of July 7, 1960.

18. See Doman, *Postwar Nationalization of Foreign Property in Europe*, 48 COL. L. REV. 1125 (1948).

Richard C. Allison was graduated in 1948 from the Law School of the University of Virginia where he was a member of the Board of Editors of the *Virginia Law Review*. Since then he has practiced law in New York City and has concentrated upon international matters. He has lived and traveled in Cuba and many other countries in the course of his legal work.

amount of the bonds will be paid at maturity regardless of the size of the fund. Cuban lawyers are undecided on this point. Whatever the final answer may be, it is not easy to conceive of a security with less market value than a non-interest-bearing thirty-year Castro bond.

The American companies taken under Law 851 include Cuban Electric Company, Cuban Telephone Company, the oil companies, the leading sugar companies, the insurance companies and the Cuban branches of American banks.

On October 13, 1960, the Council of Ministers adopted Law 890[19] nationalizing 382 Cuban-, American- and other foreign-owned companies. The stated purposes of this law are to transfer control of basic industries to the government and "to liquidate the economic power of the privileged classes". The law states that the question of compensating the owners will be covered by a later law.

At the same time, Law 891[20] nationalizing the remaining private banks (except the Canadian banks) was adopted.

The Urban Reform Law of October 14, 1960,[21] which virtually confiscates all dwellings not occupied by their owners, seems to foreshadow the elimination of private property as an institution.

Miscellaneous Edicts

The widely publicized interventions and expropriations have obscured other measures which had stifled business operations even prior to the mass seizures.

The recodification of the Cuban tax legislation adopted in July, 1959,[22] although badly needed in order to simplify the tax structure, increased income tax rates at a time when business activity and profits were in a sharp decline. Other tax measures were aimed at individual industries. The taxes imposed on the extraction and exportation of minerals, such as nickel and cobalt, were considered by operators in the field to be so confiscatory in their effect that continued operation could not be justified.[23]

The public utilities, both telephone and electric, were hit by rate reductions[24] which made it impossible for them to produce income sufficient to meet their obligations and to finance their construction programs.

The labor laws were amended to prohibit employers from reducing their payrolls regardless of diminishing business activity[25] and their inability to adjust to the circumstances led to insolvency in many cases.

As a result of these and other measures, operations in Cuba were rapidly becoming impossible from an economic point of view within a short time after Castro assumed control.

Recovering Confiscated Properties or Compensation Therefor

The principal legal question springing from these events is: How is the owner of seized property to enforce his right to restitution of the property or to be compensated for its loss? The bedrock consideration here is economic, but the prosecution of the claim with due attention to the requirements of international law should facilitate final settlement and may avoid serious pitfalls.

When the expropriation is completed by the signing of the "acta" and the owner's representatives have been ousted, the immediate legal consideration is the exhaustion of remedies doctrine. The owner will wish to present a formal claim through the United States Department of State and perhaps eventually through an international tribunal, and it may be important to the success of any such claim that the owner take advantage of any course of action open to him under the laws of Cuba to contest the expropriation. Under international law a claimant who has not availed himself of the opportunities afforded him under local law to protect his interests may not be given a hearing afterwards in an international forum. Also, the State Department, before espousing a claim of an American citizen, wishes to be satisfied that the claimant did not have a local remedy.

Law 851 specifically provides that no appeal shall lie against expropriations carried out thereunder. Nevertheless, it would normally be possible under Article 172 of the Fundamental Law to take an appeal to the Cuban Supreme Court against Law 851 itself and many, if not all, of the expropriated American companies endeavored to do so. Their efforts were unavailing because they were unable to obtain Cuban legal representation willing to attack the Cuban law.

A number of leading Cuban law firms rendered a joint opinion to their expropriated American clients stating that Law 851 is constitutional and that any appeal against it in the Cuban courts would be unsuccessful. (This is also their opinion as to Law 890 although that law does not specifically preclude appeals.) This opinion should be conclusive in establishing the futility of legal action under the laws of Cuba. It may be helpful to individual claimants if they are able to submit proof of the efforts actually made by

19. OFFICIAL GAZETTE (Special Edition) of October 13, 1960.
20. *Id.*
21. OFFICIAL GAZETTE (Special Edition) of October 14, 1960.
22. Law 447 of July 14, 1959—OFFICIAL GAZETTE (Special Edition) of July 16, 1959.
23. See NEW YORK TIMES, August 15, 1960, page 1, column 4.
24. Law 121 of March 3, 1959, *supra* note 8; Law 502 of August 19, 1959—OFFICIAL GAZETTE of August 25, 1959.
25. Law 82 of February 17, 1959—OFFICIAL GAZETTE of February 20, 1959.

hem to perfect an appeal. Many com-anies are obtaining affidavits from heir representatives who were in Cuba t the time, setting forth in detail the teps taken by them to obtain effective egal representation.

Although the exhaustion of remedies loctrine has been strictly applied with he result that claimants in internation-al proceedings have found themselves out of court without a hearing on the merits, it will not be carried to unrealistic extremes, particularly where actions of high officials of the foreign state are the cause of the damage. As a former American Secretary of State said: "A claimant in a foreign State is not required to exhaust justice in such State when there is no justice to exhaust."[26]

Law 851 states that the President and the Prime Minister shall appoint experts to appraise the expropriated properties. If this is actually done, the owner may be given an opportunity to present evidence in substantiation of his claim. Claimants who are afforded such an opportunity will have to decide whether and to what extent they will participate in the valuation proceeding. It might be inferred from the exhaustion of remedies doctrine that they should appear, offer expert evidence and take any other steps permitted them. When the proceeding is concluded, again assuming that the law is carried out, the owner will have to decide whether he will accept the bonds offered as compensation. Acceptance could raise a presumption that the claimant had waived his rights and acquiesced in the application of Law 851. These will be difficult questions—if they arise—and each claimant will have to make his own decision on the basis of the circumstances existing at the time.

When everything feasible has been done to protect the claimant's rights at the local level, his next move must be made through international channels.

It is usually accepted in the non-Communist world that there is a principle of international law requiring just compensation of foreign owners of expropriated properties. This precept is recognized and supported by the Government of the United States. (See Secretary Hull's note of April 3, 1940, to Mexico stating "the right to expropriate property is coupled with and conditioned on the obligation to make adequate, effective and prompt compensation".[27]) However, it must be recognized that in some quarters today there is being propounded a theory that underdeveloped nations, or nations desiring to reorganize their social or economic structures, are entitled to deal with foreign investments in a manner not permitted to the capital exporting countries.[28] This dual standard is unjust and unacceptable by any properly oriented ethical standards. Moreover, it inhibits the flow of trade and investment which is vital if these same underdeveloped nations are to become prosperous members of the world community. Thus, international morality and the law of nations, as well as wholly pragmatic considerations, demand that, where a loss is inflicted by a state upon an alien, proper indemnification must be provided.

The most effective way of reducing the sometimes nebulous rules of international law to concrete terms is through international treaties. Where possible, the United States Government has in recent years included in its treaties of friendship, commerce and navigation a special provision with respect to expropriation. For example, in the treaty with Nicaragua signed in 1956[29] it is stipulated that each country will pay a "prompt and just compensation . . . in an effectively realizable form" in case of expropriations of properties of nationals of the other country. Under this treaty Nicaragua and the United States agreed to submit disputes to the International Court of Justice. If there were such a treaty in existence with the Republic of Cuba, the legal situation would be clearer than it is. There is one treaty with Cuba, however, which may help claimants who have lost properties on the Isle of Pines provided they had owned them for a number of years.[30]

If fair compensation must be paid, how is this obligation to be enforced? An investor who has suffered loss at the hands of a foreign government and who sets out to do something about it encounters two formidable legal obstacles at the threshold of every potential course of action. These are the principle of sovereign immunity and its companion, the Act of State doctrine.

A review of these rules and the limitations which they impose upon private efforts to remedy breaches of international law will throw some light on the practical questions which we face today.

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26. Mr. Fish, Secretary of State, to Mr. Pile, May 29, 1873, 6 MOORE'S DIGEST 667.

27. 2 Department of State Bull. 380 (1940).

28. Baade, *Expropriation Problem in Foreign Investment*, 12 VA. LAW WEEKLY (1960); Kuhn, *Nationalization of Foreign-Owned Property*, 45 AM. J. INT. L. 709 (1951).

29. Treaty with Nicaragua on Friendship, Commerce and Navigation, January 21, 1956, Article vi, T.I.A.S. No. 4024 (effective May 24, 1958).

30. The treaty between the United States and Cuba under which the United States relinquished its claims to the Isle of Pines states that United States citizens holding property on the Isle of Pines at the time of the exchange of ratifications of the treaty (March 23, 1925) "shall suffer no diminution of the rights and privileges which they have acquired" prior to that date (T.S. No. 709).

A Summary of the 1960 Report of the Administrative Office of the U.S. Courts

Mr. Shafroth, who has recently been appointed Deputy Director of the Administrative Office of United States Courts, has furnished us with this summary of the latest report of the Administrative Office. The report, of course, is highly important, and lawyers in particular have an interest in the "business" conditions of our federal court system.

by Will Shafroth • ***of the Administrative Office of the United States Courts***

CONGESTION STILL exists in the civil dockets of the United States District Courts, but long delays in reaching trial are chiefly confined to the courts of the large cities. In the smaller districts, personal injury cases are regularly being terminated within a year of filing, according to Warren Olney III, Director of the Administrative Office of the United States Courts. This is one of the highlights set forth in the Annual Report of the Director filed each year with the members of the Judicial Conference of the United States prior to their meeting in September. The report covers the fiscal year 1960 and in addition to a general statement by the Director contains individual reports concerning the condition of the judicial business of the courts, the bankruptcy cases, a discussion of probation in the federal courts, a review of the business administration functions of the office, and a report by the head of the Personnel Division.

In reporting annually to the Conference, the Director covers the condition of the business of the courts, summarizes the activities of the various departments of the Administrative Office, the budget situation of the judicial branch of the government and the legislation in Congress of special interest to the judiciary. The report is issued to the members of the Conference and circulated to the federal judiciary in mimeographed form and later, in a paper-backed edition with the report of the proceedings of the Judicial Conference, printed as a public document and sent to Congress and to the Attorney General and given a limited general circulation. A brief résumé of some of the features of the 1960 Report follows.

The Judicial Business

The District Courts of the United States finished the fiscal year ending June 30, 1960, with practically the same number of civil cases pending as at the beginning of the year. While it may therefore be stated that no ground was lost, it is quite unrealistic to make a sweeping generalization about the condition of the federal trial courts as a group. In most of the large cities the situation is unsatisfactory in that civil cases terminated after trial during the year were one to four years old and sometimes even older when they were finally closed. Half of the cases so disposed of had been pending for periods of sixteen months or longer in Detroit to thirty-seven months or longer in Brooklyn. It will not do to say that this was the fault of counsel, as the courts have an obligation to bring about prompt disposition of their cases and this can be done if the dockets are current as is illustrated by a number of the smaller districts.

The time required from filing to disposition of cases tried in the metropolitan courts as compared with seventy-four other courts having only federal jurisdiction is illustrated by Table I.

About half of the non-metropolitan districts are disposing of the median case tried in fourteen months or less and for the run-of-the-mill personal injury cases, which are usually tried to a jury, the median in those districts is less than one year. For all jury cases in the same districts the median is twelve and a half months. In four districts, the Middle District of Alabama, the Western District of Arkansas, the District of South Dakota, and the Western District of Tennessee, in half of the civil cases tried, trial was reached in less than six months after filing.

The time-interval figures based on actual time elapsing between filing and disposition of tried cases are probably the best indication we have of docket conditions and point up the fact that

Table I

Median Time*—Filing to Disposition for Cases Tried in Fiscal Year 1960—Courts Having Only Federal Jurisdiction

(The figures are for the entire district. The cities listed are the largest cities in these districts.)

	Cases Terminated After Trial	Median Time
New York, Southern (New York City), Pennsylvania, Eastern (Philadelphia), Pennsylvania, Western (Pittsburgh), and New York, Eastern (Brooklyn)	954	30 to 37 months
Illinois, Northern (Chicago), Massachusetts (Boston), California, Northern (San Francisco), Michigan, Eastern (Detroit), New Jersey (Newark), and Ohio, Northern (Cleveland)	750	16 to 20 months
Florida, Southern (Miami) and California, Southern (Los Angeles)	384	13 to 14 months
74 other districts having only federal jurisdiction	2,891	14 months (The range is 5 to 26 months)

* The median is the middle number in a series which is arranged in numerical order from the lowest to the highest. When a series of cases is arranged in an ascending order from shortest to longest according to the interval of time elapsing between filing and disposition, the time interval of the middle case in an odd-numbered series is the median time interval for that series. If there is an even number of cases in the series, the average of the time intervals for the two middle cases is the median. Thus in half of the cases the time interval is longer than the median and in half of the cases it is shorter.

Table II

County population	Number of jurisdictions reporting	Average time in months for a personal injury case to reach a jury trial after the parties were "at issue"* Average time	Range
Over 750,000	21	22.9	6 to 70
Between 500,000 and 750,000	18	12.2	2 to 30.7
Under 500,000	59	6.5	18 days to 18 months

* The state court figures collected by the Institute and the federal district court figures of the Administrative Office are not comparable as the Institute's figures are estimated averages and refer only to personal injury cases, while the federal court figures are based on factual medians and include all types of civil cases.

Table III

Civil Cases Filed in the United States District Courts (except Alaska), Fiscal Years 1948 through 1960

Fiscal Year	All Civil	Private Civil
1948	45,665	29,337
1949	52,236	30,248
1950	53,336	30,929
1951	50,214	30,818
1952	56,926	34,101
1953	62,284	38,453
1954	57,433	37,537
1955	57,335	37,245
1956	60,182	39,026
1957	60,328	40,516
1958	65,019	43,620
1959	55,521	35,224
1960	57,665	36,878
Per cent change, 1948-1958	+42%	+49%
Per cent change, 1958-1960	−11%	−15%

most of the docket congestion in the federal courts is found in the large cities. This general conclusion also applies to the state courts; the 1960 figures from the Institute of Judicial Administration[1] are shown in Table II.

The United States District Courts handle both civil and criminal cases, but most of the judicial time is spent on civil cases and the docket conditions are largely dependent on the state of the civil business. Criminal cases have priority and are normally handled promptly. On the average they take about a quarter of the judges' time. Therefore the discussion in the Annual Report deals principally with civil cases.

The number of civil actions filed during the last fiscal year in all districts (excluding Alaska, where a new United States District Court with only federal jurisdiction was organized) was 58,000 in round numbers, an increase of 4 per cent over the preceding year, the number of terminations only 200 less and 61,000 cases remained on the dockets at the end of the year. Private civil cases are listed separately in the tables in the report because of their greater impact on the workload of the judges. Studies by the Administrative Office have shown they require on the average about 3 times as much expenditure of time per case by the judges as cases in which the United States is a party.

Table III, indicating the filings from 1948 through 1960 of all civil and of private civil cases (which are included in all civil), shows what has been happening.

The trend is apparent. From 1948 to 1958 there was an increase of approximately 40 per cent in all civil cases filed and 50 per cent in the important private case category. In 1959, the limiting effect of the Jurisdiction Act of July 25, 1958,[2] resulted in a

1. Calendar Status Study—1960, Institute of Judicial Administration, New York, New York.

2. P.L. 85-554, 72 Stat. 415, amending 28 U.S.C. §§1331, 1332, and 1445. This statute required that the jurisdictional amount in diversity of citizenship cases and in some federal question cases exceed $10,000 instead of, as formerly, $3,000, provided that a corporation, for purposes of jurisdiction be deemed a citizen of the state where it has its principal place of business, as well as of the state of incorporation, and prohibited the removal of cases arising under state workmen's compensation laws from a state court to a United States District Court.

decrease of 15 per cent in all civil cases and 19 per cent in private civil cases. In 1960 the curve turned up again, with an increase of 4 per cent in all civil cases and 5 per cent in private cases. This is about the same rate of increase as in the years from 1948 to 1958. However, during most of these years the cases commenced exceeded the number terminated and the dockets fell behind during the ten-year period at an average annual rate of 1,700 civil cases and 1,900 private cases. It is this heavy pending load which has caused the congestion of the civil dockets.

The decrease in filings caused by the limitation of the jurisdiction of the federal courts made possible a reduction of 4,400 in the pending civil caseload in 1959, but this gain was not continued in 1960 so that the present pending caseload is 61,000 civil cases including 45,000 private cases compared with 46,000 civil, including 26,000 private cases, in 1948.

But again it is necessary to use caution in referring to the condition of the dockets as a whole when any characterization of the situation based on mass figures may create a wrong impression as to individual districts. In 1960, while there was almost no change in the sum total of pending civil cases, forty-nine districts showed an increase and forty-one a decrease.

Productivity per judge has shown a sharp increase in the last twenty years, the report points out, citing figures to show an annual disposition rate of 169 per judge in 1941 compared with 222 in 1960. Part of this increase is undoubtedly due to increased pressure on individual dockets which has produced more settlements and has tended to result in concerted attacks on pending lists in multiple-judge courts. But it also reflects increased efforts to improve docket conditions and a fuller use of the modern instrumentalities of pretrial procedure including discovery and the pretrial conference.

Also there has been mounting concern at the failure of Congress to create new judgeships asked for by the Judicial Conference of the United States. Requests for increases in the judicial force in the district courts and the courts of appeals ordinarily come from circuit councils and chief judges of the circuits and are channelled through two committees of the Judicial Conference, the Committee on Judicial Statistics headed by Chief Judge Harvey M. Johnsen of the Eighth Circuit, and the Committee on Court Administration under the chairmanship of Chief Judge John Biggs, Jr., of the Third Circuit. After approval by these two committees, the recommendations must run the gauntlet of the Judicial Conference itself consisting of one circuit and one district judge from each circuit, the Chief Judge of the United States Court of Claims and the Chief Justice of the United States, presiding. Over the years practically all of the Conference recommendations on this subject have been followed by Congress, but the difficulty has been the lapse of time between the making of such recommendations and their enactment into law. It has now been six and a half years since the last judgeship was created and since that time the judiciary has actually lost three judgeships by the expiration of temporary positions. Recommendations to each Congress since that time have been made but not acted on. Current recommendations awaiting the action of the 87th Congress include fifty district judgeships and nine circuit judgeships. This includes one circuit and four district judgeships recommended by the Conference in September, 1960.

Criminal Cases

The criminal dockets of the district courts are with few exceptions in excellent condition. In 1960, the report points out, 28,000 cases were filed, approximately the same number were terminated and the pending load at the end of the year amounted to 7,700 cases, about one seventh of which were not available for trial because of fugitive defendants. In the last five years, the number of criminal cases commenced annually has only varied by a few hundred cases with no definite trend discernible. Bootleg liquor cases and interstate transportation of stolen motor vehicles are the largest single categories of cases and there were about 4,000 of each commenced in 1960. In addition there were 2,500 forgery cases, 1,000 tax violations, 1,500 narcotics indictments, 2,300 immigration violations in wet-back cases on the Mexican border, 500 migratory bird informations, 235 bank robberies and a number of other cases. About 31 per cent of the trial time of all judges in the courtroom was spent on criminal cases.

Bankruptcy

For the fourth consecutive year, bankruptcy cases begun reached an all-time peak. A considerable increase in the rate of filings took place in the last half of the fiscal year, resulting in a rise of about 9,000 cases to a record total of 110,000 for the year, a 9 per cent increase over last year. Almost all of the increase came in the classification of wage-earning employees and others not in business, filing voluntary petitions. Business bankruptcies including merchants, manufacturers, farmers, members of the professional groups and some others accounted for only 11 per cent of the total. The referees in bankruptcy, who handle these cases, closed about 99,000 cases, which was more than in any previous year, leaving 95,000 pending at the end of the year, also a record high.

E. L. Covey, Chief of the Bankruptcy Division of the Administrative Office, reports increasing strain on the referees' offices as a result of the tremendous increase in the volume of bankruptcy cases, which has been practically continuous since 1946, and points out the need for additional clerical and referee service for which the last Congress failed to provide adequately. Since the enactment of the law in 1946 providing for salaried referees and the payment of fees in bankruptcy cases to the government, a surplus of about $7,500,000 has been built up to pay referees' salaries and expenses.

Courts of Appeals

There has been some increase in the business of the United States Courts of Appeals over the last decade, but the rise has been gradual and the pending load has increased only moderately. In 1960 the increase in cases filed was 4 per cent with 3,900 cases begun and 3,700 terminated.

The caseload is not evenly distrib-

ted among the various circuits and he Second, Fourth and Fifth Circuits ave been laboring under very heavy urdens. Fortunately a number of re- ired judges have been willing to help nd some of the Courts of Appeals ave called on district judges to sit with them and bear some of the bur- den. In congressional hearings last spring, Chief Judge J. Edward Lum- bard of the Second Circuit testified that in the last two years, one third of the work of his court had been done by judges who were not active circuit judges of his court.

The report points out that the Courts of Appeals have continued to maintain a record for prompt decision of cases after hearing or submission with a national median for that interval of only forty-five days.

The median time intervals from filing to disposition for individual cir- cuits varied from five to ten months with a median of 6.8 months for all circuits.

Probation

The system of probation in the fed- eral courts dates from 1925. Soon after the creation of the Administrative Of- fice in 1939, the Judicial Conference authorized it to take over from the Department of Justice the responsibil- ity for the supervision of probation officers. There has been continuous progress under the direction of the Probation Division of the Administra- tive Office since that time. Louis J. Sharp, Chief of the Division, discusses the purpose of probation and pre- sentence investigation and recent de- velopments in the following excerpts from the report:

> Probation is recognized as an essen- tial element in the administration of criminal justice. The fact that pre- sentence investigations are made by federal probation officers on approxi- mately 86 percent of all defendants convicted in federal courts and that 42 percent of these defendants are placed on probation, is indicative of the high regard the federal courts hold for the investigative and supervisory functions of the probation officer and reflects the prominent part played by probation in criminal justice.
>
> Protection for the public and justice for the individual offender are the pri- mary goals of both probation and parole. No person is a suitable candi- date for either unless there is reason- able assurance he will not be a menace to the community. The test for proba- tion is whether the defendant, as well as his family and the community, will benefit more from his placement on probation than from commitment to an institution.
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> * * *
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> During 1960 the Federal Probation System celebrated its thirty-fifth anni- versary. The bill authorizing probation in the federal courts was signed by President Coolidge on March 4, 1925 (18 U.S.C. chapter 231).[3] It was not until 1927 that the first probation offi- cers—three in number—were appoint- ed. In 1930, 5 years after the enact- ment of the law, there were only eight officers. In 1931 the number was in- creased by the Congress to 62 and by June 30, 1960, there were 506 proba- tion officers and 353 clerical assistants in the Federal Probation System's 170 field offices, serving district courts in all the United States and in Guam, Puerto Rico, and the Virgin Islands.
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> * * *
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> During 1960 a total of 30,169 investi- gations of all types were made, com- pared with 30,976 the year before. The number of presentence investigations totaled 23,662, a decrease of 330 under last year.
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> * * *
>
> Just as important as the careful selection of persons for probation and parole are adequate guidance and counseling for them during the period of supervision... A total of 12,085 probationers were newly received from the courts in 1960 compared with 12,350 in the previous year. The num- ber of parolees received dropped from 4,098 to 4,085, and persons on manda- tory release from 3,223 to 3,029. Mili- tary parolees coming from disciplin- ary barracks dropped from 380 to 126. At the close of the year there were 34,343 persons under supervision, an increase of 231 over 1959.

Business Affairs of the Courts

The Division of Business Adminis- tration prepares the budget of the courts, audits the accounts of offices and courts of the Federal Judiciary, supplies books and materials to the judges and clerks, prints and distrib- utes over two hundred different forms, buys the furniture, supplies and equip- ment for the courthouses and acts as a liaison agent with other government agencies in making arrangements for space, planning new buildings and providing proper facilities for the courts, as well as a host of other things. The report contains a breakdown item- izing the expenditures of the judicial department for 1960 which amounted to some $47,000,000, excluding the Supreme Court, but including the sal- aries and expenses of referees in bank- ruptcy which are paid from special funds deposited in the Treasury from the fees collected from the bankrupts and their estates. As has been pointed out elsewhere, the entire budget of the courts is less than one sixteenth of one per cent of the total federal bud- get. Director Olney, in referring to the financial affairs of the courts, points out that although Congress did increase the appropriations for the judicial department for the fiscal year 1961, it failed by a considerable amount to appropriate the sums re- quested by the Judicial Conference and this response by the Congress "does not meet the needs of the courts for additional services, facilities, and per- sonnel to cope with seriously congest- ed dockets". Wilson F. Collier, Chief of this Division, reports that during the fiscal year 1960, nine new build- ings containing court quarters were completed, seventeen new buildings were under construction and eight ad- ditional buildings are in the design stage.

A report of the Division of Person- nel, by its chief, Dawson Hales, refers to improved procedures and practices adopted during the year and the com- pletion of management surveys previ- ously begun. He states that the federal judicial family consists of approxi- mately 400 judges, active and retired; a slightly smaller number of secre- taries; some 285 law clerks; some 1,200 employees in the offices of clerks of court; 500 probation officers; 700 United States commissioners; 172 ref- erees; 200 court criers; 250 court re- porters and about 1,500 other em- ployees for a total of 5,500 persons, an increase of one per cent over last year.

3. The original Federal Parole Act was enact- ed in 1910.

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EDITORIAL OFFICES

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Sprinkle, Sprinkle, Little Trust

Arising out of estate planning is a new jargon of words describing trusts. Those who first began to plan the disposition of estates did the legal profession a favor when they translated *inter vivos* trusts into "living trusts". Some of their new definitions are quite meaningful; others require explanations.

When grandpa used to fetch a bucket of water from the well, the water sometimes spilt over the edge. Remainder interests in trusts are now created by spill-over or pour-over trusts; that is, what the life tenant leaves is transferred to other trusts.

Grandma used to sprinkle the wash before ironing; a shower sprinkles the lawn, so does a sprinkler. Nowadays, if grandma wants her children and grandchildren to receive some or all of a trust, she creates a sprinkling trust, directing that the income or principal or both be distributed from time to time to her flock.

The robust spendthrift trust is called a discretionary trust. The spendthrift's feelings must not be hurt.

The prodigal hurries home to his father's funeral, not to mourn, but to make certain he will receive his full share of the estate. He always thought the old man was a bit touched although his father continued to add to his wealth until his death. There must have been a twinkle in the old man's eye when he directed his lawyer to provide in his will that the prodigal would receive the income from a small part of his estate, but if the prodigal contested the validity of the will, even this small income would be paid elsewhere. Should we call this a twinkling trust?

Then there is the rich woman with a husband who has an eye for the ladies. His devoted wife wants to provide handsomely for the occasional wanderer but also wants to make certain that none of the hussies will enjoy her money if she predeceases her husband. So she directs that the husband shall cease to receive any income if he remarries. Shall this be called a "hussy trust"?

"Madam", advises the estate planner, "you should create a living trust with a pour-over for your husband, limited by a hussy clause, a twinkling provision for your son, and with sprinkling features for your grandchildren." "Now", says the estate planner, "I will explain what this means."

Sooner or later the authors of words on trusts will add a lexicon so that the lawyer who does not have frequent contacts with the estate planners will understand the meaning of sprinkle and twinkle and the other new names for trusts which have survived the Statute of Uses. Sometimes we wonder if the good old terminology is not the clearest after all.

Make Your Hotel Reservations Now!

The Eighty-Fourth Annual Meeting of the American Bar Association will be held in St. Louis, Missouri, August 7-11, 1961.

The December, 1960, issue of the *Journal* carries a complete announcement with respect to hotels, registration, etc., and in requesting accommodations please use the hotel reservation application therein provided.

Attention is called to the fact that many interesting and worthwhile events of the meeting will take place on Sunday, August 6, preceding the opening sessions of the Assembly and the House of Delegates on Monday, August 7.

Requests for hotel reservations should be addressed to the Meetings Department, American Bar Association, 1155 East 60th Street, Chicago 37, Illinois, and must be accompanied by payment of the $25.00 registration fee for each member for whom reservation is requested. (The fee for members of the Junior Bar Conference is $20.00.) This fee is NOT a deposit on hotel accommodations but is used to help defray expenses for services rendered in connection with the meeting.

Be sure to indicate three choices of hotels, type of accommodations desired and by whom you will be accompanied. We must also have definite dates of arrival and departure.

The United Nations, the World Court and the Connally Reservation

The Connally Reservation, limiting United States' acceptance of the jurisdiction of the International Court of Justice, was the subject of extended debate in the House of Delegates at the last Annual Meeting of the Association. It will be recalled that the House voted 114 to 107 to reaffirm its 1947 position in favor of repeal of the reservation. Mr. Gambrell argues that the reservation should be repealed, but he suggests that the United States consider adopting other means of safeguarding our national security.

by E. Smythe Gambrell • ***of the Georgia Bar (Atlanta)***

BY FORMAL ACCEPTANCE of membership in the organization of the United Nations fifteen years ago, this country recommitted itself to the eternal quest for an alternative to force in the resolution of disputes among nations. As a practicing lawyer who shares with the profession a firm and abiding faith in the future of America, who cherishes the institutions that have made us a free and powerful nation, and who is deeply concerned about our awesome responsibilities, I long have been interested in the Connally Reservation and the controversy it has engendered. My views have not been arrived at easily or hastily, but are the product of deliberation and of growing conviction that the mantle of leadership which has been thrust upon us by the course of events cannot be lightly cast aside.

The issue presented by the current proposals for the repeal of the Connally Reservation is in a sense a narrow, legal one. A decision either way is not likely to have direct and immediate consequences of any great importance. But the implications are broad and far-reaching and, in time, the very future of mankind and the continued existence of civilization may be seriously affected.

To isolate the technical question, it is necessary to recall the historic origins of the World Court. The horror and devastation of World War II drove the peoples of the earth to the realization that, for survival, armed force must be abandoned as an instrument of national policy. The embodiment of this realization was the organization of the United Nations in San Francisco during the summer and fall of 1945. Inevitably, the United States assumed the leading role in the formation of this new agency of world co-operation. We need not pause here to discuss whether the United Nations has accomplished all that was envisaged for it. Few would claim that the great mission assigned to it has been carried through with perfect success. But virtually all agree that the United Nations, in many ways, is serving a useful purpose.

In the formative deliberations that gave birth to the United Nations, the participants were mindful of the oft-taught lesson that the best instrument for keeping the peace is a court. They were also aware of the value of history and precedent in the workings of legal institutions. As a result, the United Nations Charter carries as an adjunct an additional treaty establishing the International Court of Justice. In large part, the structure of this World Court was modeled after the Permanent Court of International Justice which had operated under the aegis of the old League of Nations during the period between the great World Wars. The scope of the new court's jurisdiction is substantially the same, and several justices of the old court subsequently have served on the new.

The court is declared by Article 92 of the Charter to be the "principal judicial organ of the United Nations" and an integral part of that organization. As an international body, the United Nations has no proper concern with the domestic or internal affairs of any country. The World Court is subject to the same limitation. Thus Article 2 of the United Nations Charter expressly provides that "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit

such matters to settlement under the present Charter." This is reinforced and restated in the separate treaty, annexed to the United Nations Charter, regarding the court. This treaty, officially named the Statute of the International Court of Justice, sets forth explicitly the extent of the jurisdiction. In accordance with traditional principles of judicial action, the court may consider only cases properly brought before it by the parties to a dispute, and the dispute must be legal, not political or legislative. Within this framework, Section 36 of the so-called Statute continues by specifying the limited classes of disputes which fall within the jurisdiction of the court. These are:

First, "disputes concerning . . . the interpretation of a treaty";

Second, "disputes concerning . . . any question of international law", meaning those rules and principles of international conduct which, though not included in a treaty, have been accepted or acquiesced in by the nation to be bound;

Third, "disputes concerning . . . the existence of any fact which, if established, would constitute a breach of an international obligation"; and

Fourth, "disputes concerning . . . the nature or extent of the reparation to be made for the breach of an international obligation".

To summarize, the court's power is confined to deciding questions of law—law the parties have made for themselves either by treaty or by acceptance of settled international customs and usages—to deciding questions of fact to which this law applies, and to determining the reparations to be made, in the form of monetary damages or otherwise. By setting the boundaries of the court's jurisdiction within the confines of international law, the treaty establishing the court necessarily excludes the court from consideration of the domestic or internal affairs of any nation.

Although every nation which is a member of the United Nations is entitled to participate in the selection of the justices of the court and is nominally a party to the treaty creating it, a United Nations member is not automatically subject to the jurisdiction of the court. On the contrary, only those countries which specifically submit by a special act of ratification are subject to its compulsory jurisdiction. This consent is manifested by the filing of a declaration of adherence with the United Nations Secretariat and the court. Thus far, some thirty-nine nations have declared their acceptance of this judicial power.

The United States was among the first so to declare. Upon the advice of the State Department and with the support of the American Bar Association, the Senate Committee on Foreign Relations submitted a report in the summer of 1946 recommending that the Senate, in the exercise of its constitutional prerogative to pass upon proposed treaties, approve American acceptance of the compulsory jurisdiction of the World Court. The recommended declaration of adherence provided, in accordance with the terms of the underlying Charter, that the United States' acceptance of the court should not apply to "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America".

When this committee report was placed before the Senate for action, Senator Connally of Texas submitted an amendment from the floor. This amendment, which had been considered and rejected by the committee, added to the proviso reserving domestic matters from the acceptance the following eight words: "as determined by the United States of America". The amendment was adopted, and took effect to qualify the United States' declaration. Thus our commitment provides that the United States' acceptance of the court's jurisdiction shall not apply to "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America, *as determined by the United States of America*".

The question, then, is narrowed to this: Who should decide whether a particular subject matter of dispute is essentially within the domestic jurisdiction of the United States? Should the question be left to the decision of the court, or should the United States itself decide? It should be clearly understood that the question is not whether domestic issues should be decided by the World Court. No one would argue that an international tribunal should have power to make decisions regarding the internal affairs of the United States or of any other country. Even if a nation did choose, for some improbable reason, to submit its domestic law problems to the judgment of the World Court, the Charter of the United Nations and the limited scope of the court's jurisdiction would stand in the way. We all agree that the United States' declaration of adherence should except from the court's jurisdiction disputes with regard to matters which are essentially within the domestic jurisdiction of the United States. The current issue is only whether we should also take away from the court, and hold for ourselves, the determination of what matters are domestic. The question at stake is solely who decides that preliminary jurisdictional issue.

Whether the Connally Amendment should be repealed or retained depends upon whether its retention costs more than its existence is worth. What, then, is the price we pay for this Amendment?

First of all, the United States pays in its loss of prestige as leader of the free world. The fundamental and essential article of our faith as a free people is government by law and not by men. It is our hard-won heritage and the author of our liberty. The rule of law is the genius of our governmental system, an example for men of all nations who yearn to be free. In this day when a third of the world's population, in the new nations of Africa and Asia, face the choice between Communism and freedom, our best weapon is the rule of law, not only as a belief but as a practice. We proclaim ourselves as dedicated to bringing law to the relations of nations as we have established it between man and man. The totalitarian states behind the Iron Curtain have mouthed their pretended devotion to a world rule of law, but their actions have belied their words. Not a single Iron Curtain country has accepted the compulsory jurisdiction of the World Court. Have we in the United States done much better? Have we demonstrated by action the courage of our convictions?

By the Connally Amendment, we have reserved to ourselves the final, absolute and unreviewable power to decide whether the subject matter of a dispute is within our domestic jurisdiction and thus beyond the power of the World Court. The supporters of the Amendment intend that it should be invoked only in good faith and that the United States should resort to the reservation only when its responsible officers honestly believe that the dispute is domestic. But there can be no guarantee. Such determination would be conclusive, and impartial inquiry would be foreclosed. No matter how unfounded, the United States' bare statement that the matter is domestic would put an end to it. The domestic reservation can thus be asserted, as a matter of power, in any and every case. It is in this sense that the Connally Amendment has been generally called the self-judging clause, since it carries with it the right in any dispute to make the decision that the Court has no power to render judgment against us. It violates the ancient precept, known to every legal system, that no man should be a judge in his own cause.

We, in America, have no doubt that the United States will employ this power only in good faith. But can we fairly expect the other peoples of the world to be equally free from doubt? By the Amendment, we have put on record our official mistrust of the World Court, our lack of confidence in its capacity to reach a correct, unbiased decision on whether a dispute is domestic. However, we have committed to that same court the critical power to make decisions on the merits concerning the vital interests of the United States in the *international* field. Could not other peoples with reason suspect that the United States would not entrust its international security to a court which it otherwise mistrusts, and that the amendment might therefore be a subterfuge to oust the court of jurisdiction in clearly international matters? Have we not opened ourselves to the charge that we have perverted the law, rather than submitted ourselves to it?

Since the United States effectively has reserved the power to decide in all cases whether it will be sued or not, we are as a practical matter in the same position as those countries which have refused to accept the compulsory jurisdiction of the court at all, and somewhat in the same camp with the Communist nations behind the Iron Curtain in our distrust of the rule of law. Although we are by nature the leader among the nations of the world in advocating an international rule of law, we are placed in the anomalous position of lagging behind the thirty-three countries which have accepted the compulsory jurisdiction of the World Court leaving to the court the decision of its own jurisdiction, while we place ourselves above the law in this respect.

Viewing the question without regard to national prestige, but considering only the selfish interests of the United States, the Connally Amendment costs us dearly. Under the statute, the jurisdiction of the World Court over the nations which appear as parties is mutual and reciprocal. This means, as the court has held, that no country may be sued over its protest unless the plaintiff nation bringing the suit could also have been sued if the tables had been turned. Thus any reservations respecting the jurisdiction of the court which we provide for ourselves as defendants are automatically available to any nation we may have occasion to sue. When the Connally Amendment was adopted, we, in one sweep, closed the doors of the court against our own just claims in relation to any nation which has accepted compulsory jurisdiction. We can be confident that the United States will act conscientiously in deciding whether a dispute is within its domestic jurisdiction. But can we be as confident regarding the good faith of other nations with whom we may have disputes? We would be naïve to suppose that other nations will always be able to put aside the temptation to protect their own interests by invoking the domestic jurisdiction privilege which we have conferred upon them by our adoption of the Connally Reservation. The more flagrant the violation of international law, the greater the temptation to conceal it behind the privilege. Certainly the interests of the United States as a plaintiff would have more adequate protection if the question of jurisdiction were left to an impartial court than to the decision of the defendant.

E. Smythe Grambrell is a former President of the American Bar Association (1955-1956). A native of South Carolina, he received his A.B. from the University of South Carolina and his LL.B. from Harvard. He practices law in Atlanta.

At least one nation already has learned its lesson from this backlash effect of the Connally Amendment. Following the lead of the United States, France originally filed its declaration of adherence to the World Court with a proviso substantially identical with the United States reservation. Subsequently, France had occasion to bring suit in the World Court against Norway on a dispute concerning Norwegian bonds sold in France. Although Norway had accepted the compulsory jurisdiction of the court without reservation, the court properly held that Norway could avail itself of any limitation upon the court's jurisdiction which would have been available to France as a defendant, and dismissed the suit upon Norway's statement that the dispute related to matters essentially within its domestic jurisdiction. Shortly after being taught this object lesson, France repealed the self-judging portion of its reservation—and so did Great Britain.

Today the interests of the United States extend throughout the world. Half a million of our citizens are based

abroad, and another three quarters of a million travel to foreign countries annually on business or pleasure. We have forty-five billions of dollars invested within the borders of other countries. Our military bases on foreign soil are of critical importance to the defense of the free world. The protection of these far-flung interests depends upon observance of the obligations of our treaties with other nations and the principles of international law. Should these obligations be violated, we, by the Connally Amendment, effectively have deprived ourselves of the right to seek judicial redress. The solemn promises made to the United States in its many treaties with other nations thus have no greater binding force than the consciences of their leaders.

In recent years there has been scattered agitation in the Republic of Panama concerning our rights in the Canal Zone. The existing treaty, reaffirmed in 1955, sustains without question our position under every principle of international law. The Supreme Court of Panama has held the treaty to be binding. The Republic of Panama has declared its adherence to the compulsory jurisdiction of the World Court. Without the Connally Amendment, we would be entitled to the confirmation of an impartial judicial tribunal, speaking on behalf of the world at large, to sustain our position in case any doubt should arise. Through the Connally Amendment, we have denied ourselves that right.

Another cost of the Amendment results directly from the role of leadership that has fallen to the United States. We were the first nation to reserve for ourselves the right to decide whether a controversy is domestic or international. Following our example, Liberia, Mexico, Pakistan, the Sudan, and the Union of South Africa have adopted similar provisions. To a significant degree, then, we have been the leaders in a trend that diminishes the effectiveness of the court as a forum for the settlement of international conflict, and thus have discouraged the establishment of the rule of law as an alternative to the rule of war. The Connally Amendment stultifies our position in the movement for an international legal order, and denies judicial process for the protection of our national interests. Is the protection it affords worth the cost?

The circumstances of the adoption of the Amendment on the floor of the Senate without the support of a committee report have meant that there is little legislative history to explain the dangers it was intended to avoid. The arguments in favor of its retention are based principally on the apprehension that the World Court, in the exercise of its powers, might invade the domestic field. If the reservation is applied in good faith, it could be needed only in the unusual case where trained jurists of the World Court reach a conclusion on the question different from the decision of the responsible officials in the United States' Department of State. In fourteen years, the Amendment has been invoked only once by the United States, and there is every reason to believe that the court then would have concluded that the matter was domestic, if the power to decide had not been taken away from it.

World Court Has Respected Limitation of Its Powers

Throughout its history, the court has demonstrated a scrupulous regard for the limitation of its powers to the international field. Some of the spokesmen for retention of the Amendment have expressed concern about possible prejudice to our national policies on immigration and tariffs, since they involve relations with other countries. But under settled rules of international law, enunciated by the World Court as by every other authoritative voice, a subject is not controlled by international law simply because it affects more countries than one. The test is whether it has been regarded traditionally by the nations of the world as the subject for domestic legislative enactment or as the subject of determination through diplomatic channels. Matters such as immigration and tariffs are universally regarded as domestic.

We, of course, know that what a court decides today does not necessarily stand for all time, and the unrestricted judicial power to fashion rules of law in accordance with the whims or predilections of judges would give cause for concern. But the World Court possesses no such power. Under the governing treaty and statute, the court is given authority to decide only two kinds of questions of law, namely, questions of the interpretation of treaties and questions of international law. The United Nations possesses no legislative power. Its authority is based solely upon treaties among the nations which adopt them. The United Nations' Declaration of Human Rights and its proposed Covenant on Human Rights sometimes are pointed to as illustrative of threats against the way of life enjoyed by American citizens. But the Declaration is no more than a verbal gesture expressing the view of the delegates concerning the minimum rights that should be afforded to individuals in any civilized state. It has no force of law in the World Court or elsewhere. The proposed Covenant on Human Rights likewise is nothing more than its name implies—a recommended treaty prepared by a study group in the United Nations. Unless and until it should be proposed by the President and approved by two thirds of the United States Senate, it has no more effect than any of the many measures prepared for introduction each year in the national Congress.

It should be clear, then, that the question of world government is not involved. The World Court has power to interpret and apply United States treaties only when we have duly entered into such treaties. But it is not in keeping with our national conscience to enter into the solemn obligations of a treaty and at the same time to declare that we will not answer to an impartial court for failure to comply with it.

It is meaningless to talk about repeal of the Connally Amendment being a surrender of the sovereignty of the United States. We remain, and would remain, free to enter or not to enter into new treaty obligations. To hold a man accountable in court for the performance of his solemn contracts does not impair his individual freedom. On the contrary, by providing the benefits and the burdens of enforcement of voluntary undertakings, the law *extends* personal liberty. So it is with nations. When the United States voluntarily en-

ters into a mutually binding treaty, its sovereignty is not sacrificed, but is recognized and asserted.

I do not want to be misunderstood as supposing that judges are somehow divine. Unfortunately, human frailty is not all left behind when a man ascends the bench, and the personality of the judge cannot be entirely eliminated from the business of judging. Is there reason to fear the World Court on this score? The fifteen justices of the Court are elected by the member nations of the United Nations, upon the basis of nominations made by designated national groups. The elected justice is in no sense the representative of a country or constituency, but the member nations in selecting justices are admonished to assure inclusion of representatives of the world's principal legal systems. Typically, the Court has included three justices from the Anglo-American legal system and a greater number of justices from nations applying the civil law. With few exceptions, the justices have been men of mature years with distinguished careers as judges of the national courts or as legal educators. They serve for nine-year terms, staggered at three-year intervals, so that five justices are elected in every third year. Ordinarily the justices have been re-elected at the expiration of their terms, and justices who have died in office have been replaced, with one exception, by justices from the same country. It would take time, therefore, to effect any substantial change in the character of the Court. Barring death and resignation, six years would be required to replace a majority of the justices. And the United States' declaration of adherence is by its language terminable upon six months' notice.

In the past the justices of the World Court, even those from Communist dominions, often have cast their votes against the positions of their home lands. But we must not delude ourselves into thinking there is no likelihood that a justice occasionally will be the puppet of some dictator, willing to do his bidding. However, even dictators cater to public opinion and hunger for popular approval. As the scrutiny of the world focuses on the international forums, statesmen and judges will be more and more inclined to observe the canons of decency and civilized behavior. It seems to be a law of human nature that men tend to live up to the standards set for them by the public, perhaps because of a new sense of pride and self-respect produced by the confidence reposed in them. Often a man of no particular distinction when he takes office earns our respect and achieves a new stature through his service. There are times, I am sure, when some of us would prefer not to submit our interests to the decision of some American judge in the state or federal courts. However, anarchy inevitably would result if such a belief were sufficient justification for our placing ourselves above the law.

World Court Depends on Moral Force

In the unlikely event that the powers arrayed against the free world should by some *coup* seize control of the World Court and seek to convert its authority to a weapon of conquest, the United States would be free, both legally and morally, to withdraw its official acceptance of the court's jurisdiction. The weight of the judgments of the court depends principally upon their moral force, and this force would disappear if impartiality, obedience to precedent, and adherence to principle were abandoned. The only possible agency for enforcement of the decisions of the World Court is the Security Council of the United Nations. The Security Council, like every instrumentality of the United Nations, is specifically prohibited by the provisions of the Charter from intervening in the domestic affairs of any member nation, and would be bound to refuse to take any steps in the enforcement of a judgment of the World Court which entailed an open violation of this command. As a permanent member of the Council entitled to the right of veto, the United States would have an ultimate guarantee against any proposed action in violation of the Charter's specific limitations respecting domestic jurisdiction. Of course any decision by the World Court plainly in excess of the jurisdiction conferred upon it by United States treaty would be regarded as a nullity in our national courts.

The Connally Amendment, it should be remembered, is not an infallible guardian of domestic jurisdiction, but depends upon human institutions. It rests upon the treaty power of the United States Senate, and confers upon the Department of State, as the agency of the executive branch concerned with foreign affairs, the power to decide what is domestic. The Amendment succeeds in its purpose only to the extent that we can rely on these two agencies of government. If the Senate or the State Department cannot be trusted, the protection is illusory.

But if they *can* be trusted, the Amendment is unnecessary. The World Court's jurisdiction is confined to two classes: treaty cases, and international law disputes. As to the treaty jurisdiction, the Senate can assure the same protection simply by refusing to approve any proposed treaty that invades domestic affairs. In its international law jurisdiction, the court enforces only those rules which have been recognized and accepted. If the State Department can be trusted with the power conferred upon it by the Connally Amendment, it can be trusted without that Amendment to do its inherent duty and to refuse to accept or acquiesce in any suggested rule of supposedly international law that instead relates to domestic concerns. Thus without the Amendment, the United States, through the Senate and State Department, would still control the court's jurisdiction over domestic matters.

In the final analysis, the Connally Amendment furnishes little protection at great cost. If the position of the opponents of repeal is sound, and the World Court cannot safely be entrusted with the power to decide questions affecting the important interests of the United States, then the Amendment falls dangerously short of providing complete protection. Our declaration of adherence to the World Court apparently commits us irrevocably to the judgments of the court on all questions within the proper sphere of *international* law, and the Connally Amendment makes reservations only in respect to our *internal* affairs. We are, then, like the blind guides of the Scriptures, for we strain at a gnat while we swallow a camel. Today matters of the most vital and critical significance to

the security of the United States fall in the realm of international law. In contrast with the multitude of alternative protections available to guard against a World Court error in deciding what is domestic, we have little safeguard against the possibility of a gravely wrong decision on a question of the interpretation of a treaty or of international law. Nor is there any reason to assume that the enemies of the United States will launch a campaign to subvert through the World Court our domestic policies in such fields as immigration and tariffs, in preference to an attack upon the network of treaties and mutual understandings that unite the free world against the forces of oppression. We are left by the Connally Amendment with little protection in the international areas where we are most vulnerable and most likely to be the object of a legal attack. These reasons led Great Britain to alter its declaration of adherence to the World Court, to abandon the self-judging feature, and to reserve disputes affecting the national security of the United Kingdom and its dependent territories. I would favor a similar reservation for our country. The Connally Amendment might well be repealed and replaced by a new reservation which would eliminate the costly self-judging feature and leave to the court the enforcement of the domestic jurisdiction clause, and add a reservation that our adherence would not apply to disputes involving our national security. The change would give protection not now afforded, while freeing us of the Connally Amendment drawbacks.

To advocate repeal of the Connally Amendment is not to say that Senator Connally and his colleagues were ill advised in their action. The circumstances of 1946 were entirely different from the present. The World Court and the United Nations itself then were new and untried. The United States enjoyed a comfortable monopoly of nuclear weapons, the science of ballistic missiles was in its infancy, and the age of space had not arrived. As more of the nations of the world develop or gain access to atomic weapons and long-range rockets, international friction grows increasingly dangerous. Even a minor dispute may trigger the ultimate holocaust.

No one could pretend that the repeal of the Connally Amendment will in itself bring enduring peace. The causes of war are not so simple, nor are they always susceptible of judicial resolution. But when the stakes are the survival of mankind, any step forward, however small, is a major advance.

Peace is the ancient mission of the law. The history of civilization is, in its essence, the story of the gradual growth and extension of the rule of law as an alternative to force, spreading from the family to the tribe and eventually to the nation. We in America have taken pride in proclaiming that in our national life we are governed by the rule of law, that the processes of law are obeyed, that those who wield temporal power are themselves governed by law, that ours is a government by principle and process, rather than by people. We boast that in legal disputes we have thrown away the sword and outlawed among ourselves the ordeal by battle. Therefore, we betray our heritage if we now refuse to stand before the law and be judged, or claim for ourselves more than even-handed justice in the field of international law.

We must be in position to demand that the strident voices of totalitarianism make their reckless accusations before the Bench, supported by formal proof. We must let the world see with unmistakable clarity who it is that would evade the scrutiny of the law.

We know that enduring settlement of international controversy cannot rest entirely upon the personal amity of incumbent heads of state or the ephemeral spirit of the summit. Diplomatic negotiation cannot always succeed in resolving disputes, and, upon its failure, an alternative must be available short of war. It is a stark and simple fact of life today that resort to force is no longer tolerable. It has fallen to us, the people of the United States, to lead the world toward a way of living in peace together. For the future of mankind we cannot forsake the task.

The Connally Reservation and National Security

Mr. Ober's thesis is that this is no time to withdraw the so-called Connally Reservation, in view of the international situation and the growing power of the Communist and neutralist states in the United Nations. The question of the Connally Reservation seems certain to be raised again in the 87th Congress, which convenes this month. The American Bar Association, of course, is on record as favoring withdrawal of the reservation and that position was reaffirmed at the Washington Annual Meeting last August by a 114-107 vote in the House of Delegates.

by Frank B. Ober • ***of the Maryland Bar (Baltimore)***

THE CONNALLY AMENDMENT to the United States reservation to its acceptance of the compulsory jurisdiction of the World Court in 1946 empowers the United States and not the World Court to determine when matters should be excluded from its jurisdiction because "essentially within the domestic jurisdiction of the United States". This amendment[1] followed long-established practice; was adopted by a 51-12 vote of the Senate and was prompted by a "*desire to safeguard the vital interests of the United States*".[2] The particular concern voiced by Senator Connally at the time was the fear that such vital matters as the Panama Canal, immigration and tariffs might be considered "international" by the court.[3] Recent relevant treaties have deepened this concern because the interpretation of treaties in legal disputes is explicitly vested in the World Court by Article 38-2(a) of the Statute,[4] thus making such questions "international". Moreover, the conception of what is "international" has for other reasons also concededly expanded.[5]

The 249-member House of Delegates of the American Bar Association this year, by a bare majority of those present who voted (114-107), reaffirmed its 1947 recommendation that the Connally Amendment should be repealed. This new and close vote (compared to its two-thirds vote in 1947 of those present and voting) reflects primarily the growing doubts of the Bar due to intervening events—including the Cold War[6] and the change in the United Nations due to the doubling of its membership through the admission of new states.

Thoughtful lawyers therefore increasingly question whether *this is the time* for unilateral judicial disarmament. They find the repeal of the Connally Amendment would leave standing our commitment to give six months' notice before withdrawing from compulsory jurisdiction. It becomes imperative therefore to study all reservations and conditions of other nations and not merely the Connally-type — of which there are but four (other than ours) — if we are to understand our position compared to that of other nations if the Connally Amendment should be repealed.

Plainly, the question of repealing Connally, which is so vital a protection to our security in important areas, cannot be settled by the vote of a bare majority of the House of Delegates. For sound constitutional reasons treaties (like proposals for constitutional amendments) require a two-thirds Senate vote for ratification. Nor has the public accepted the House of Delegates' vote as very convincing.[7] Nor should it be, for the current arguments for outright repeal ignore facts not only relevant but of fundamental importance to any informed decision on this matter so vital to national security. These facts must be brought out in the open and debated by the Bar if recommendations

1. This was accomplished by adding the words "as determined by the United States", our entire reservation, including the Connally Amendment, being often called in the current debate the Connally Reservation. For practice see Finch, 46 A.B.A.J., 852.

2. See report of American Bar Association Section of International Law quoted in Senate Hearings on S. 94 before Foreign Relations Committee, 86 Cong. 2d Sess., pages 304, 337 (hereinafter called Senate Hearings).

3. Senate Hearings 303-4.

4. "Statute" as used in this paper refers to the Statute of the International Court of Justice annexed to the United Nations Charter.

5. For expanding conception of international law see Professors Briggs and Swebel, Senate Hearings 47-50; 1959 Section of International Law, Rep. *ibid.* 300, 325-333. See also Baltimore Evening Sun editorial of March 23, 1960, commenting on our position that South African riots are not solely "domestic".

6. *E.g.*, loss of a dozen nations and one third of world's population to Communism; that no Communist nation has ever accepted compulsory jurisdiction of the court with or without reservations; that Russia has broken fifty treaties (Senate Hearings 220), stirred up wars as in Korea and Hungary, and is currently threatening trouble over the RB 47, in Congo and in Cuba, on our own doorstep.

7. Washington Post, September 1, 1960; U. S. News, September 12, 1960. Representatives of much larger groups than the American Bar Association, such as veterans' organizations, testified against repeal in the Senate Hearings.

by lawyers are to have any influence. These omissions include (1) ignoring the non-Connally-type reservations of other nations; (2) ignoring the increase in Communist and other biased judges in the World Court which will be inevitable because of the admission of seventeen new members to the United Nations, including sixteen African states who have but recently achieved independence; (3) ignoring the obvious fact that a more fundamental condition to trust and confidence in the World Court has always been agreement in advance on clear rules of international law and what are and what are not justiciable "legal disputes".

Reservations by Other Nations

The chief argument for repeal of our reservation, which is repeated in substance by all of the proponents of repeal, is that England, France, India, Mexico, Liberia, Sudan, South Africa copied our reservation; and "As experience demonstrated the self-judging type of reservation to be unwise . . . England, India and France dropped it from their acceptances. To date thirty-three nations have accepted the Court's compulsory jurisdiction without such a reservation. . ." It is even argued that such repeal "would only place our relations with the Court *on the same basis* as those of France, the United Kingdom, Canada and thirty other nations".[8]

They do not even mention, much less candidly explain:

(a) That France in the third of its four *present* reservations excepts "disputes arising out of a crisis *affecting the national security* or out of any measure or action relating thereto".[9]

(b) That Britain not only has nine specific reservations and reserves the right to terminate on notice, but expressly reserves in Section 2 of its declaration of adherence the right "*at any time* by means of a notification . . . to the Secretary General and with effect as and from the MOMENT of such notification . . . to ADD to, amend or withdraw any of the foregoing reservations".[10]

(c) That India not only withdrew her Connally-type reservations, but at first even withdrew her acceptance entirely and on re-adhering September 14, 1959, provided (as do all other British commonwealths) that she may *withdraw on notice.*

(d) That three of the four nations above listed by proponents of repeal as still having Connally-type reservations *in addition may terminate on notice.* Thus, if the Connally-type reservation were repealed by all of these four nations, Mexico alone would be left in the same position *as the United States in being required to give six months' notice before it could terminate its acceptance of compulsory jurisdiction of the World Court!*

(e) That only thirteen—*not thirty-three other nations as stated by proponents* — have in any meaningful sense accepted the compulsory jurisdiction of the World Court without strong safety provisions. Since these thirteen include no Communist nation and none with whom we are likely to have a serious dispute, their acceptance of compulsory jurisdiction has little importance.[11]

Proponents of repeal of Connally in their numerous articles discuss only that type of reservation. Of course, they should not properly be charged with intentional omission of important facts, *but no one can doubt the relevance and importance of the present French and British reservations above quoted, nor the great importance of the right to terminate on notice reserved by all but thirteen of the thirty-three other nations claimed by the proponents to have accepted compulsory jurisdiction.* Is there any real difference in substance between acceptance on a treaty-by-treaty basis and the right to terminate jurisdiction immediately *on notice* if a member so stipulating does not want to be sued in the World Court? It will probably be argued that acceptance of compulsory jurisdiction with the right to terminate on *notice* puts those twenty-two nations so doing in practically the same class as the United States which *would have to give six months' notice* if Connally were repealed. But (1) neither our six months' notice provision nor the veto power over Security Council *enforcement* would furnish any protection to the United States, since our official position is that the United States would consider itself bound to carry out any decision of the World Court during such six months' period,[12] and (2) by contrast, the right of the World Court to decide even pending cases would end on withdrawal by any nation reserving the right to terminate on notice.[13]

Incidentally, some of the very leaders in the proposal to repeal Connally have been suggesting seriously the desirability of abolishing the veto that they now claim is a safety provision.[14]

Changing Personnel of Court and Bias

The proponents of repeal argue at length that *past* voting records of the fourteen foreign judges of the World Court show that we may safely trust important issues to that court. They

8. Rhyne, 46 A.B.A.J., 750 (July, 1960); see also report of American Bar Association World Peace Through Law Committee 8, 14, 30; Tondel, 46 A.B.A.J., 726; Larson, 46 A.B.A.J. 729; minority report of the Thompson Committee (Dean) at page 9; Winslow reply to Holman, page 24; Jessup, Sen. Hearings 412. Pakistan omitted because of the new declaration—see note 11, *infra.*

9. This reservation is in addition to, and is not limited to, domestic issues and covers the much broader field of international disputes. That the World Court will ever attempt to avoid the clear intent of this reservation or to intervene in any matter which France considers affects her national security, because of its judicial power over jurisdiction (absent such exception), is inconceivable and its successful assertion of such jurisdiction is practically impossible.

10. Britain also has a safety provision in its ninth reservation, requiring adherence of nations bringing suit against her for a period of at least one year which, if contained in the United States' reservation, would prevent Cuba, for example, from seeking the aid of the World Court as she is now threatening in connection with our Guantanamo base, apparently intending to adhere for that purpose.

11. Ten have no fixed period of adherence and so may withdraw at any time; twelve have expressly reserved the right to withdraw on notice. This classification is based on the text of the acceptances in the 1959-60 INTL. CT. OF JUSTICE YEAR BOOK, page 233 *ff.*, except that Pakistan on September 12, 1960, withdrew its Connally-type reservation but is included among the twelve nations expressly reserving right to withdraw on notice. The thirteen other nations that do not have either security or Connally-type reservations, and which cannot terminate on notice, in addition to our allies, Nationalist China, Japan, Holland, Belgium, Denmark, Norway, Luxembourg and Turkey, are Switzerland, Finland, Sweden, Cambodia and Liechtenstein. The Administration, as evidenced by the testimony of Secretary of State Herter and Attorney General Rogers (Sen. Hearings 16, 21, 25, 26, 304 *ff.*) seems to follow without examination the statements of the leaders in the American Bar Association movement for repeal, and evidences no awareness of the importance of the non-Connally-type reservations.

12. Senate Hearings, Rogers 29-30; Humphrey 89. Indeed, we have solemnly covenanted in Article 94-1 of the Charter itself to comply with such decision.

13. See *McCardle* doctrine, UNITED STATES CONSTITUTION, Corwin (1952) page 614; see also 14 AM. JUR. 388; 6 C.J.S. 173. No delay is involved, since the Executive can give notice—Senate Hearings 31.

14. *E.g.*, Rhyne, June, 1954, WISC. BAR BULLETIN.

even attempt to thus show that the two Communist judges now on the Court can be trusted! In so doing, they ignore entirely the Communists' own statements, as well as those of our own Attorney General and other competent authorities, that Communist judges are agents of the state and not independent.[15] There can be no doubt that judges from other monolithic governments also act as agents of the state in exactly the same manner as do Communist judges. The conception of an independent judiciary is true in relatively few countries.

To American lawyers, who make every effort to keep politics out of the selection of judges, the electoral machinery for the World Court is indeed shocking. It is hardly likely that the political maneuvering so clearly evident in recent years, and particularly during the latter months of 1960, in the General Assembly and the Security Council will suddenly cease when judges of the World Court, one of its organs, are to be considered. *Nominations* are (under a complicated procedure) really made by the executives of the member nations, each of which may nominate a judge, but none can have more than one judge.[16] Can anyone really doubt how any judges *nominated* by dictators like Castro, Nasser, Trujillo, Sukarno, Nkrumah and Toure and many others, whether Communist or not, will vote on issues which their bosses deem vital to their own nations?

The *election* of judges is by concurrent action of the General Assembly and the Security Council. The eleven-member Security Council already has one permanent Communist member, and when the neutralists led by Nehru (and also many Western nations) have their way with the admission of Red China, there will be two permanent Communist members. But in addition to that, the majority of the Security Council (six) are elected by the General Assembly bi-annually—which thus has the ultimate control of the composition of the Security Council. The United States has but *one* vote out of 99 (the present membership of the General Assembly). By contrast, the African bloc alone has a vote of 26![17] Yet it is not merely those who openly co-operate with the Soviets, like Nkrumah, but Nehru, who is currently reported as saying the United Nations Charter is "weighted too much in favor of Europe and the Americas at the expense of Asia and Africa"![18] We are not concerned with diplomatic reasons for the tremendous changes now going on, or with the future of the United Nations, but solely with the obvious fact that the electoral machinery for World Court judges plainly invites political maneuvering. It should be manifest to all that as the present six vacancies are filled and as a third of the Court is triennially renewed, the World Court will include not only two Communist judges as at present, but more and more judges, whether coming from Communist or other monolithic states, who will regard themselves as agents of their respective states with no tradition of an independent judiciary. If we are interested in non-political and unbiased judges, is not such political jockeying and maneuvering in the changing General Assembly (and indirectly in the Security Council) and the *future* personnel of the World Court infinitely more important than the *past* voting records of prior judges (so stressed by proponents), which largely

Frank B. Ober has practiced law in Baltimore since he was graduated from Harvard Law School in 1913, except for the period of World War I. He has served in the House of Delegates of the American Bar Association and is a past President of the Maryland State Bar Association.

reflect (a) their selection by a smaller number of more advanced nations before the Cold War became so hot, and (b) decisions in cases which have not involved matters of the magnitude which could lead to peace or war, or which involved national security?

The present argument is not whether biased judges will constitute a *majority* of the court. No lawyer wants even a few biased judges. Decisions often turn on a few votes. For example, there were five dissents and one partial dissent out of fourteen judges sitting in the World Court in the *Corfu* case (Sen. Hearings 360). There were divided opinions in 75 per cent of the cases heard in the last term of our

15. As Vishinsky himself says (Soviet Constitutional Law 55 and 390): "The Court of the Soviet State is an inseparable part of the governmental machinery of the proletarian dictatorship... In content its activity is identical with the activities of other agencies of administration which have the task of protecting and strengthening the revolutionary order... The program of the Communist Party repudiates the principle of separation of powers." See also Dean Stason, of Michigan Law School, AMERICAN JUDICATURE SOCIETY JOURNAL, February, 1960; U. S. NEWS, August 29, 1960, page 35; Editorial, CHRISTIAN SCIENCE MONITOR, August 20, 1960. Attorney General Rogers: "... The law in the Soviet Union is what the Communist Party says it is." 45 A.B.A.J. 1182; Rhyne: "It is clear that the Soviet legal system is under the domination of the Communist Party...", 45 A.B.A.J. 249; Benes: "Law and legal institutions have become tools and weapons of the Communist State. Their purpose and aim are to serve the new regimes in their efforts to reconstruct society and to suppress the enemies of communism. The concepts of communism jurisprudence are entirely alien to those which have been accepted and developed for centuries in the Western World." 40 A.B.A.J. 487. See also 35 *id.* 269; 37 *id.* 101; 41 *id.* 408.

16. Senate Hearings 45, 51.

17. Changes in the Security Council will inevitably follow. It is widely conceded that the close vote this year indicates Red China will be admitted next year. When the remaining nineteen African colonies are freed and admitted to the U. N., the African bloc, 85 per cent illiterate and largely uncivilized, with but a slightly larger population, will have forty-five times the voting power of the United States! The United States' voting power will be further diluted on the admission of eighteen more Asiatic nations.

18. The Nehru statement was reported in the BALTIMORE SUN October 4, 1960; the population figures are reported in various publications—see, for example, U. S. NEWS, October 3, 1960; and the shifting power has been widely commented upon—see, for example, U. S. NEWS, August 22, 1960; NEW YORK TIMES, September 18, 25 and October 2, 1960. The *reductio ad absurdum* is that thirty-one of the present member states are not as large as a single average state of the United States, like Maryland, and yet have thirty-one times the voting power of the entire United States. Indeed, there are a number of them not as large as a single Maryland county. Moreover, what has happened to the basic reform project of *weighted* representation, advocated long before the United States' voting strength based on numbers alone had dropped to its 1 per cent present level of absurdity—*e.g.*, Rhyne, *supra*, note 14. Khrushchev is reported widely to be trying to rule or ruin the U. N. itself. But, irrespective of ultimate or present success in such efforts, nobody can believe that Communist judges on a World Court will block their master's wishes on issues their bosses deem vital.

own Supreme Court, including a five-to-four division in a matter involving federal supremacy over the states! It can hardly be doubted how the admittedly Communist judges would act in cases that might involve, for example, Cuba and Panama. But would not judges from the Arabic countries, in view of the recent cancellation of the Canal lease, be likewise biased? For that matter, how would judges from the South American bloc react? Or on questions of confiscation and expropriation of property in Cuba or elsewhere, how would judges from countries which have recently indulged in the same practice free themselves of their national interest? Our Guantanamo Naval Base, under perpetual lease from Cuba (obtained after we had freed Cuba from Spain), is concededly the keystone of our Caribbean defense. Castro currently threatens to have our rights determined by "international law". Are we really willing to delegate its disposal, which may involve our national survival, to such a court?[19]

If the issues involved are minor legal disputes not really involving fundamental issues, then we must realize and accept the view that a program of world peace through law must be much more gradual than its proponents suggest. If, on the other hand, the World Court is really to decide issues involving international disputes of a magnitude which may lead to war, then we must be prepared to transfer *from our elected representatives* to a World Court decisions involving fundamental national foreign policy and our national security! If the latter, few judges on a World Court will find it humanly possible to divorce themselves from their overriding interest in and their loyalty to, their own country and its allies.

Are there then any rules limiting the jurisdiction of the World Court and defining the law it would administer?

Vagueness of Justiciable Disputes and International Law

Bar associations spend much effort in making domestic law more certain and predictable through codification, uniform statutes, restatement of the law, etc. Courts demand precision of statute as a protection to defendants in the criminal courts. Where is the precision in the international law which nobody has attempted to codify? Yet, certainty is of transcendant importance to whole nations if the program of "world peace through law" is to resolve issues which may really involve peace or war. Do we find any real guide for judges from fifteen nations in the loose language of Article 38 of the Statute:

(1) "International *custom*" as evidence of a general *practice* accepted as law? Surely customs have varied widely between nations and have been both accepted and rejected at various times, so that there is little area where agreement is general. Or in

(2) "Principles of law recognized by *civilized nations*"—Moslem? Asian? South American? African? Is Cuba "civilized" after sixty years of independence, or Congo after ninety days? But can the World Court say members of the United Nations are not even civilized?[20] Or in

(3) "Publicists' teachings". There will be much difference of opinion on who are authoritative "publicists" and, as pointed out above, it is conceded that the area of international law is increasing.

Nor could decisions of the World Court have much effect as precedents (Statute, Article 59). Surely, it is infinitely more important in this realm of conflicting ideologies, legal systems, opposing rules of publicists, than in the field of relatively uniform domestic law to codify, or at least define, the rules in advance. Lack of certainty was but recently stated to be the basic cause of the widespread distrust and disuse of the World Court.[21]

Then again, there is no clear rule on what is "justiciable" and what is "political". This goes to the heart of the matter and is not solved by restriction to "legal disputes". The claim[22] that matters so politically important as the Berlin and Suez crises could be materially affected by judicial decisions seems incredible. Does anyone actually believe that significant parts of these issues will be left to a court to decide *in the light of current history?* Or the Cuban crisis, where (absent a political solution by the Organization of American States) the President has indicated the (unilateral) Monroe Doctrine will be invoked if necessary to hemisphere defense and our national safety?

It is now argued by proponents that a World Court would be helpful to the collection of financial claims. Aside from the legal problem posed by the limitation of access to the World Court to only nations as parties, under Article 34(1) of the statute, there is no substantial record of its successful use for this purpose in the past, and *certainty of law* in this limited area is just as essential for a World Court as for a domestic court.

Conclusion

The Cold War since 1946 has demonstrated the imperative need for caution in unilateral judicial disarmament. It is submitted therefore that *this is not the time* to repeal the Connally Amendment because (1) it would weaken our position *vis-à-vis*, not only Communist nations but substantially all great powers, unless we substitute some of their non-Connally type safety conditions or reservations;[23] (2) the World Court will inevitably include more and more Communist and political judges as the relative voting power of the more advanced Western nations continues to decline through the admission of numerous little primitive "states"; (3) there is the obvious absence of a code or clear rules of international "law" or definition of "legal disputes" realistically protecting us from judicial inter-

19. See Hanson Baldwin, SATURDAY EVENING POST, September 24, 1960.

20. Yet neither Communist nations nor many of the new members are "civilized" under orthodox definitions—*e.g.*, 1 Oppenheim, INT. LAW 1905, page 31; Hall, INT. LAW 1909, page 39.

21. *E.g.*, Rhyne, *supra*, note 14.

22. See World Peace Through Law Committee Report, page 24.

23. Such as (a) the right to withdraw at will, like most of the great powers, or (b) a clearer national security reservation, which was the obvious intent of the Connally Reservation and which is inherent in a conception of national sovereignty. It should be noted that such reservations are much broader than the Connally-type reservation, since they plainly would cover political disputes as well as legal disputes. (c) Professor Sohn (46 A.B.A.J. 25) called sixteen reservations major without counting the right to withdraw at will, and suggested alternatives to outright repeal. These also should be studied instead of being blandly ignored as they are by the leaders in the repeal movement.

ference with our foreign policy, upon which we depend for national security.

On the other hand, if the world peace through law program is reoriented to give priority to the solution of these problems, it may, as nations gradually gain confidence, be helpful in the limited area where disputes are really subject to judicial solution. However, any implication that this alone will bring peace is a harmful delusion. Manifestly, all history proves that most wars are due to political disputes, which can only be solved by agreements reached after the give and take of diplomatic negotiations—in which judges would have no rules and for which they have no qualifications.

Let us hitch our wagon to the stars, but not deceive ourselves by substituting slogans for solutions—nor, as lawyers, *omit* relevant facts and *ignore* alternative solutions in the current debate on Connally.

Judicial World Supremacy and the Connally Reservation

Professor Collier declares that there is nothing in the Charter of the United Nations or the Statute of the International Court of Justice to prevent the court from deciding issues that are essentially matters of domestic concern. His reasoning is set forth in this article which urges the retention of the Connally Reservation as our only protection against the invasion of our domestic affairs by the World Court. The American Bar Association, of course, is on record as favoring withdrawal of the reservation.

by Charles S. Collier • ***Professor of the College of Law, University of Houston***

THE CURRENT discussions with regard to the proposed repeal of the so-called Connally Reservation have brought into clear focus many important legal and political problems with regard to the juristic basis and the potential scope of the jurisdiction of the International Court of Justice. These discussions were precipitated by the recommendation of President Eisenhower, in his "State of the Union Message" to the Congress of the United States in January, 1960, that the Connally Reservation be repealed. The President may well have been influenced either directly, or indirectly through his legal advisers, in making this recommendation, by the Report of the American Bar Association's Section of International and Comparative Law, under date of August, 1959, which favors the proposed repeal.

As all lawyers in active practice in the United States presumably are aware, the United States Declaration Recognizing the Compulsory Jurisdiction of the International Court of Justice, promulgated by President Truman on August 14, 1946, and subsequently deposited with the Secretary General of the United Nations on August 26 of that year, set forth certain reservations, the most significant of which reads as follows: "Provided, that this Declaration shall not apply to . . .

b. disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America . . ."

The last eight words of this reservation were added in the course of the debate in the United States Senate on the Resolution of Concurrence, adopted on August 2, 1946, which is incorporated in, and constitutes the body of the Declaration ultimately promulgated by President Truman. These last eight words make up what is commonly called the Connally Reservation.

It should be strongly emphasized right at this point and without any delay that, even without the words of the Connally Reservation, the clause just quoted from the United States Declaration imposes a highly important limitation upon the jurisdiction of the International Court of Justice (so far as the United States is concerned) for this is the famous "domestic jurisdiction" reservation in the extremely compressed doctrinal form in which it was actually promulgated officially.

What Is Meant by "Domestic Jurisdiction"

I believe that there exists a very serious argumentative conflict between the "domestic jurisdiction" reservation in itself as formulated and *intended* by the United States Senate and the President, on the one hand, and the controlling provisions of the Statute of the International Court as to its jurisdiction and powers, taken in their own natural and legal meaning, on the other hand. This conflict ought to be resolved in principle by clearly worded amendments to the Statute of the International Court itself. And this ought to be done before the United States is called upon to throw away the shield of the Connally Reservation. For by reserving to the United States itself a sort of qualified veto power as to the assumption by the International Court of Justice of jurisdiction over proceedings brought against the United States in that court, in which matters of domestic jurisdiction are essentially in-

volved, the Connally Reservation has up until now rendered it relatively unimportant for the people of the United States to ascertain and understand how extensive a range of control over affairs of many sorts in the United States might be established by the International Court as an agency of World Government if the Connally Reservation were to be repealed and no other protective provision substituted. Without the Connally Reservation, the only principle or rule of limitation on the jurisdiction of that court really will be merely *the rule of discretionary self-limitation.*

The central difficulty which I desire to stress results from the fact that in certain controlling provisions of the Statute of the International Court of Justice, particularly those of Article 36 in Chapter II entitled "The Competence of the Court", the jurisdiction of that court is authoritatively *defined or described in terms of particular questions of law or fact.*

The decisive provisions are that the jurisdiction of the International Court may properly attach "in all disputes concerning" certain designated questions or issues of law or fact.

I suggest that we designate this class of issues specified in the Statute of the International Court as "United Nations issues".

They are the specific issues of law or fact which are named by the Statute of the International Court and designated as those issues whose presence in a legal dispute between two or more nations parties to the statute will be sufficient to give the court jurisdiction of that legal dispute.

But any legal dispute brought before the International Court may logically involve many other questions or issues of law or fact (of great importance in many instances) which must be solved somehow, if the controversy as a whole is to be justly and reasonably disposed of.

Shall the International Court have plenary jurisdiction to decide all these other issues, that is, to make its own judicially independent and judicially final determination as to each of them because they are logically interrelated with a single issue of the class that I have designated as United Nations' issues of law or fact? Shall the single United Nations' issue lift the whole legal dispute with all of its issues of law and fact into the paramount jurisdiction of the International Court so that the entire legal dispute viewed comprehensively may be disposed of by that court alone without any delay and without any subdivision of the matters in dispute?

Now in sharp contrast to the provisions of the Statute of International Court with the whole stress on the sufficiency of a single United Nations' issue to establish the jurisdiction of the International Court we must emphasize once more the central meaning of the United States' declaration recognizing compulsory jurisdiction. This declaration contains the critically important limitation (already quoted) as to this compulsory jurisdiction (so far as the United States is concerned). This limitation is expressed in terms of the "matters", or subject matters of the dispute. That is, under the theory of the United States' reservation, disputes are to be classified according to their *essential subject matters.* And it is announced that the United States' declaration recognizing the compulsory jurisdiction of the International Court "shall not apply to disputes with regard to matters which are essentially within the jurisdiction of the United States of America".

The paramount intention expressed in this United States' reservation seems to be that each dispute is to be classified as a whole, and the decision must then be made by some proper authority as to whether or not the particular dispute under consideration is "with regard to matters which are essentially within the domestic jurisdiction of the United States of America" so that the jurisdiction of the International Court (so far as the United States is concerned) may permissibly attach only to "disputes" that do not fall within the classifications thus excluded.

Of course, it is just at this point in the text of the United States' declaration that the words of the Connally Reservation "as determined by the United States of America" were added. But I want to emphasize at the first stage of this discussion that quite apart from the precise words of the Connally Reservation, the United States' declaration expresses the intent that all disputes shall be classified as falling outside the jurisdiction of the International Court (so far as the United States is concerned) according to the determination as to whether or not they are "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America".

Essential Character Is To Determine Classification

The controlling classification is to be made according to a determination as to the essential character of the subject matter of the dispute under consideration. And this essential character of the subject matter can only be determined by examining the dispute as a whole to ascertain all that is comprehended therein, before it can be determined whether or not the "matters", that the dispute has regard to, are essentially within the domestic jurisdiction of the United States. *This jurisdictional test of the United States' declaration is one that depends on the essential character of the subject matters of the dispute viewed comprehensively.*

I suggest that we designate this test of the International Court jurisdiction as the "essential subject matters" test.

In working out the compulsory jurisdiction of the International Court of Justice shall we follow the "single United Nations issue" test for validating that jurisdiction, or shall we follow the "essential subject-matters" test? Or shall we follow each of them at different times according to some other determining factor or circumstance? And who shall have the power to decide which critical test of jurisdiction should be followed, and when?

On these vital issues the trumpets give forth an uncertain sound. And this is true both as to the trumpet announcement of the Statute of the International Court of Justice itself, particularly when read together with Chapter I, Article 2, Paragraph 7 of the United Nations Charter, and likewise as to the trumpet announcement of the "United States' Declaration Recognizing the Compulsory Jurisdiction of the International Court of Justice".

In order to make as clear cut as possible these distinctions which I desire to emphasize, so that the alternatives before us may be fully understood, it seems necessary for intellectual safety even in a short article to quote directly the provisions that are most plainly relevant, both those that may be taken from the language of the Statute of the International Court, and those that may be taken from the United States' Declaration Recognizing the Compulsory Jurisdiction.

In the Statute of the International Court is to be found the following key provision which seems to give full recognition to what I have called the "single United Nations issue" test. Chapter 2, Article 36, Paragraph 2.

> The states parties to the present statute may at any time declare that they recognize as compulsory *de facto* and without special agreement, in relation to any other state accepting the same obligation the jurisdiction of the Court in all legal disputes concerning:
>
> a. the interpretation of a treaty;
>
> b. any question of international law;
>
> c. the existence of any fact which, if established, would constitute a breach of an international obligation;
>
> d. the nature or extent of the reparation to be made for the breach of an international obligation.
>
> . . . Chapter 2, Article 36, Paragraph 6. In the event of a dispute as to whether the Court has jurisdiction the matter shall be settled by the decision of the Court.

Now it seems clear that a legal dispute may be one *concerning*, that is it *may concern* the interpretation of a treaty or some question of international law while at the same time, the case or legal dispute, as a whole, may also *concern* several other distinct legal issues that are potentially decisive of the whole dispute. Some of these other legal issues may well happen to be legal issues that would, if taken alone, appear to be domestic issues, not falling within any of the classes expressly assigned to the jurisdiction of the International Court by the terms of the basic Statute. How can the International Court avoid deciding these domestic legal issues, if it is to take jurisdiction in all legal disputes concerning the interpretation of a treaty or any question of international law when these latter issues are interwoven in the tapestry of the case with the legal issues that we would characterize as domestic, if we were able to consider and evaluate them separately and in isolation?

One set of issues or the other must be taken to give the dominant coloring to the legal controversy as a whole, unless the International Court is to administer only piecemeal or fragmentary justice in such cases. *The result would probably be that the World Court under the terms of its basic statute would assume jurisdiction over all the domestic issues in any legal dispute where there was a single potentially decisive issue of international law or the interpretation of treaties or as to the existence of any fact which if established would constitute a breach of an international obligation or an issue as to the nature or extent of the reparation to be made for the breach of any international obligation.*

An American Analogy

This result that I have ventured to describe as "probable", would be strongly supported by the analogy of our own constitutional doctrine in the United States as to the jurisdiction of the courts of the United States in any case where a single federal question is present. It is fully established that *any one legal question or* issue, arising under the Constitution, treaties or the statutes of the United States is sufficient to establish complete federal judicial jurisdiction even though there are present in the controversy and legally involved in the decision thereof *other legal issues that are non-federal*, that is, issues whose decision depends on local domestic law in the several states of the Union that may bear an appropriate relation to the controversy under discussion. These issues of local or domestic law must and will be decided by the federal court that has the appropriate jurisdiction over the case as a whole, because of the distinctive federal issue that also is present in the controversy viewed as a whole, and which is an essential or a potentially decisive question in such cases. The presence of an adequate "federal issue" in such cases lifts the whole legal controversy into the jurisdiction of the federal court to be there finally disposed of as a whole.

This doctrine was stated in admirable language by Chief Justice Marshall when rendering the opinion and judgment of the United States Supreme Court in the case of *Osborn* v. *United States Bank*, 9 Wheat. 738, decided in February, 1824. Chief Justice Marshall says:

> A cause may depend on several questions of fact and law. Some of these may depend on the construction of a law of the United States; others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction that the title or right set up by the party may be *defeated* by one construction of the Constitution or law of the United States, and *sustained* by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this, which gives that jurisdiction. These other questions cannot arrest the proceedings. Under this construction the judicial power of the Union extends effectively and beneficially to that most important class of cases, which depend on the character of the cause. On the opposite construction the judicial power never can be extended to a whole case as expressed by the constitution, but to those parts of cases only which present the particular question involving the construction of the constitution or the law;
>
> We think then that when a question to which the judicial power of the Union is extended by the Constitution forms *an ingredient* of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause, *although other questions of fact or of law may be involved in it.*
>
> *Osborn* v. *Bank*, 9 Wheat. 738 at page 822.

So the most natural construction, and, as I believe, the legally correct construction of the grant of jurisdiction to the International Court of Justice, as set forth in Article 36 of the basic statute creating that court, is that this jurisdiction is legally available and compulsory upon all states recognizing the basic jurisdiction whenever a legal dispute between two nations is presented that *concerns*, that is, *involves*, as potentially decisive issues in any such dispute *any one or more of the issues* specifically enumerated in Ar-

ticle 36 to wit:

First, the interpretation of a treaty, second, any question of international law, third, the existence of any fact, which, if established, would constitute a breach of any international obligation, and, fourth, the nature or extent of the reparation to be made for the breach of any international obligation.

These are the great "federal questions" that will be presented under the new regime of the International Court. More precisely, these are the designations of the great classes of legal issues or legal questions which will suffice to establish the basic jurisdiction of the International Court of Justice in any legal dispute in which such legal issues or legal questions are involved as potentially decisive factors. But when once the basic jurisdiction of the International Court is thus established in any particular legal dispute, the jurisdiction will extend to, and fully embrace, all the other issues of law and questions of fact, that may be logically or practically involved in that general dispute, whether in any sense they are domestic issues or questions, or are not domestic issues or questions.

A Classical Example from American Law

The classical United States Supreme Court decision in the well-known case of *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 4 L. ed. 97 (1816), may be selected to show how the judicial power of the International Court of Justice could be brought to bear on important "matters which are essentially within the domestic jurisdiction" of the United States. On the facts of that historical dispute, if reproduced today, the International Court of Justice would have judicial jurisdiction in a proceeding brought by Great Britain against the United States, merely because the interpretation of the Jay Treaty of 1794 between Great Britain and the United States or alternatively because some question of international law would be involved as potentially decisive legal factors. But this legal dispute also would involve title to vast tracts of land in Virginia and the judicial decisions sought would be determinative of the legal and equitable title and the possessory rights to all of that land. More important perhaps, such a dispute would involve the constitutional powers of states of the United States within the scheme of the Union. The basic constitutionality of state confiscatory laws as applied to the landed estates or other property of enemy aliens would be decisively involved, and likewise the important issue as to the controlling definitions of the category of "enemy aliens" would be up for determination (a doubtful question on the historical facts especially in view of the ambiguous and "neutral" position of Lord Thomas Fairfax the undisputed owner at the time of the Declaration of Independence). The question of the constitutional power of the United States to enter into such a treaty as the Jay Treaty of 1794 and to give that treaty an extensive *retroactive* operation would be decisively involved. Nor can it be assumed for a moment that the International Court would necessarily sustain the position taken by the United States Supreme Court in the great case of *Reid* v. *Covert*, (354 U. S. 1 (1958), which seems to recognize and enforce detailed limitations derived from the provisions of the Constitution of the United States as legally paramount and controlling over the treaty-making power of the United States.

Once more, there would be questions of constitutional "due process" arising under the Constitution of the United States that would be involved in such litigation before the International Court. For example, the interesting question discussed at length by Justice Story in his earlier opinion in the case of *Fairfax Devisees* v. *Hunter's Lessee*, 7 Cranch 603, 3 L. ed. 453 (1813), as to whether under statutes authorizing the confiscation of enemy alien property there imperatively needs to be a specific formal proceeding for what might be called the "condemnation" of property alleged to be owned by enemy aliens in such a case, that is, such a proceeding as Justice Story repeatedly refers to as "an inquest after office found".

Finally in the whole range of the legal questions just suggested, the International Court would have complete power over all the many and complex *issues of fact* that would be involved. That court would not have to divide its power with a jury or administrative commission. The rules of evidence also would be exclusively for the International Court to determine from case to case or to formulate in general terms. And lastly the nature and extent of the reparation, if any, to be awarded on all these mixed issues of domestic and international law would be exclusively for the International Court to determine. Possibly the actual decision controlling all these great issues of domestic concern in the United States would be decided under Article 26 of the World Court's basic statute by a "chamber" composed of three or more judges as the court may determine.

Thus it seems almost certain that if the controlling public law instruments are left in their present form the potential jurisdiction of the International Court of Justice will turn out to be much more extensive than has hitherto been anticipated by most lawyers. At present the only external checks on the extension of that court's jurisdiction that can prove effective in practice are the Connally Reservation and the corresponding provisions in the declara-

Brown-Suarez

Charles S. Collier served as Professor of Law at George Washington University from 1920 to 1957. A graduate of Harvard College and the Harvard Law School, he is a member of the New York Bar.

tions of various other countries that are members of the United Nations and that have assented to the compulsory jurisdiction of the International Court with similar reservations. The foreseeable and probable penetration of world government into spheres that have hitherto been regarded in the United States as reserved for local and constitutionally limited legal control would be greatly facilitated if the Connally Reservation were to be repealed and no other effective protection for "matters essentially within the domestic jurisdiction" were to be immediately substituted.

There is another generalized provision not placed within the Statute of the International Court but found in the Charter of the United Nations which has been frequently referred to as the source of the "domestic jurisdiction" reservation in the "United States Declaration" so often quoted in this paper. This provision is Chapter I, Article 2, Paragraph 7 of the Charter which reads as follows:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

I submit that this paragraph cannot be given the effect of preserving the "essential subject matters" theory of the International Court's jurisdiction, as against the "single United Nations issue" theory, for the following reasons:

First:

This provision does not mention or refer to the jurisdiction of the International Court. It does not expressly or by fair implication purport to restrict the jurisdiction or the activities of that court.

Second:

The general intent of this provision is to deny authorization to the United Nations to intervene by force in matters supposed to be essentially within the domestic jurisdiction of the member states. The word "intervene" has a special and well established connotation in the language of international law. This meaning is reinforced by the last clause in this quoted paragraph which permits intervention in cases of special military and other forcible measures under Chapter VII of the Charter to prevent hostile belligerent operations. The primary meaning of "intervention" and of the verb "to intervene" (in international law usage) may be illustrated by the following quotations:

> With the right of independence goes the correlative obligation of non-intervention, *i.e.*, of refraining from all acts that would forcibly limit the freedom of another state. This obligation of non-intervention does not extend to the limitation of acts involving no display or threat of force as in the case of mediation or arbitration . . . *Intervention is the attempt of one or more states, by means of force to coerce another state in its purely state action.* [Italics added.] [Wilson and Tucker, *International Law* (Fifth Edition) pages 87, 88.]

> As a matter of both history and of principle, the prohibition of interventions must be regarded primarily as a restriction which International Law imposes upon States for the protection of the independence of other members of the international community. For this reason the notion and the prohibition of intervention cannot accurately extend to collective action taken in the general interest of States or for the collective enforcement of International Law. This means that while prohibition of intervention is a limitation upon States acting in their individual capacity in pursuance of their particular interests, it does not properly apply to remedial or preventive action undertaken by or on behalf of the organs of international society. Accordingly any apparent limitation of the right of intervention on the part of the latter must be interpreted restrictively in that sense. *Although it is expressly laid down in the Charter of the United Nations that it does not authorize intervention with regard to matters which are essentially within the jurisdiction of the States, the provision in question does not exclude action short of dictatorial interference, undertaken with the view to implementing the purposes of the Charter...* [Italics added.] [L. Oppenheimer, *International Law* (Seventh Edition, 1948) Edited by H. Lauterpacht, Vol. I, Section 140 b.]

Third:

Since the general meaning of this paragraph of the Charter (which consists of a single sentence) is to prohibit the United Nations from interferences with member states which are forcible or aggressive interferences and which are entirely outside the sphere of judicial action consented to by the members of the United Nations that are involved in any particular judicial action, it follows that the middle clause denying authorization to the United Nations to "require the members to submit such matters to settlement" should be construed in the same sense. Therefore this middle clause just quoted does not refer at all to judicial action, and cannot be interpreted so as to limit the jurisdiction of the International Court. The action of the International Court pursuant to its jurisdiction cannot be regarded in any case as forcible intervention in the sense contemplated by Chapter I, Article 2, Paragraph 7 of the United Nations Charter.

Fourth:

Quite apart from the argument based on close verbal association in the same sentence, as just set forth, the central phrase "Nothing contained in the present Charter . . . shall require the members to submit such matters to settlement under the present Charter", taken entirely by itself, *does not make use of apt or sufficient words to amount to a denial of the validity of the jurisdiction of the International Court* in any case or cases where the parties to the proposed litigation have already voluntarily accepted the compulsory jurisdiction of the International Court by valid and binding declarations still in force according to their own terms. It remains true that the only jurisdictional requisite is that the "single United Nations issue" be established for that litigation.

In *Kansas* v. *Colorado*, 206 U. S. 46, which was a suit between two states of the United States brought in the original jurisdiction of the Supreme Court of the United States, and which thus presented some obvious analogies to the appropriate jurisdiction of the International Court of Justice in actions between states which are members of the United Nations, the Supreme Court made the following statement with regard to the fundamental nature and scope of its judicial jurisdiction in suits of that classifica-

tion. The Supreme Court stresses in this passage the idea that the judicial power that may be exercised in this class of cases is extremely broad as to subject matter and is subject only to those limitations that are expressly laid down in the controlling constitutional instruments. The legal philosophy herein set forth seems applicable, *mutatis mutandis*, to the analogous jurisdiction of the International Court of Justice.

> Speaking generally it may be observed that the judicial power of a nation extends to all controversies justiciable in their nature, the parties to which or the property involved in which, may be reached by judicial process, and when the judicial power of the United States was vested in the Supreme and other courts all the judicial power which the Nation was capable of exercising was vested in those tribunals, and unless there be some limitations expressed in the Constitution it must be held to embrace all controversies of a justiciable nature arising within the territorial limits of the Nation no matter who may be the parties thereto...
>
> These considerations lead to the propositions that when a legislative power is claimed for the National Government, the question is whether that power is one of those granted in terms or by necessary implication, *whereas in respect to judicial functions the question is whether there be any limitations expressed in the Constitution on the general grant of national power.* [206 U. S. 46 at page 83.]

But in the statute of the International Court there is no express statement as to any limitation of the court's jurisdiction based on the character of the subject matters of litigation. There is no reference in this constitutional instrument to any "subject matters test" as a basis for the International Court's judicial jurisdiction.

Now we have just examined the only provision in the Charter of the United Nations that has any colorable reference to "matters within the domestic jurisdiction" of any state, namely Chapter I, Article 2, Paragraph 7. And we have reached the conclusion that this paragraph, although often mentioned and relied upon in discussions of this general subject, has actually no genuine bearing on the jurisdiction of the International Court.

Therefore, we must affirm once more that there is no effective limitation express or implied set forth anywhere in the controlling "constitutional instruments" of the United Nations that even purports to limit the judicial jurisdiction of the International Court with regard to any "domestic jurisdiction" subject matters as such. And on general legal principles as set forth in the above quotations from the Supreme Court's opinions in *Kansas* v. *Colorado*, 206 U. S. 46, 51 L. ed. 956, 1907, it follows that since there is no express "constitutional limitation" based on the constituent acts of the United Nations, the result must be that the International Court's jurisdiction will apply to all such "domestic subject matters" in all cases in which any specific "United Nation's issues" (in the sense which I have tried to define that term) are decisively involved.

A Eurosite for American Business —A la Dutch Treat

Mr. Johnson describes the characteristics of the Dutch people and the Dutch law which have made the Netherlands a leader in the commerce of the world for centuries and which make investments in Holland one of the best today for American businessmen.

by James N. Johnson • ***of the Wisconsin Bar (Milwaukee)***

That's the trouble with the
*!#%#+ Dutch,
They give too little
And they ask too much!

THIS SIMPLE, but earthy, little quatrain which, in one form or another, has been echoed throughout the past by world businessmen caught in frustrating negotiations with skillful Dutch traders, may still be true in individual transactions; but, it cannot be said to be the *modus operandi* of the Dutch Government in the post-World War II drive of European nations for new industry and stabilization of business and currency.

The first, second and sixth of the one hundred largest foreign industrial companies collated by *Fortune*[1] are headquartered in Holland, and more than one hundred American businesses have already established themselves there; pragmatic proof of the highest degree that those interested in locating manufacturing facilities in Europe find the Netherlands an outstanding site for many and varied reasons.

However, before undertaking even a cursory examination of the reasons why any particular area appears to be the most attractive to establish a European business site, we should first determine whether there are sufficient reasons to risk investment abroad at all. Currently, there are many factors that encourage not only investment in the more limited sense, but more direct operations, such as establishment of European manufacturing and selling organizations. Several matters suggest themselves without concentrated effort: first, is the potential of the European Economic Community, *post*, under which there exists, statistically, more attractive opportunity, when compared with United States standards, in capitalizing earnings and dividends; second is the conclusion that the economic growth of Western Europe must (perforce of the fact that its standard of living is below that of the United States) continue to develop at a more attractive rate than that of this country; third is the erection of a partial barrier against unsound federal tax policies and resulting continued inflation of the United States dollar; and fourth is the ever-increasing invasion of American markets (including South America) by European companies, which is reflective of the inability of United States industry to compete effectively in world trade. Any one of these factors is sufficient to warrant serious investigation into the advisability of establishing a business site in Europe. An integral part of such an investigation consists of attempting to determine where such a site can be established to assure the greatest benefits. It is with that thought in mind, that we turn to an examination of the Dutch realm in Europe.

Among the advantages which Holland offers are its superb geographical location (which affords a temperate marine climate) and the advantages which the Dutch have drawn from that location to make the Netherlands a natural link between Western Europe and overseas markets. Nature has, at one and the same time, cursed and blessed the Netherlands with water. All of us have been stirred by the legendary lad who saved his nation by plugging the dike with his thumb; but, today, the feats of magic in controlling the below-sea-level flow of water are accomplished by reclaiming hundreds of acres of land from those portions of the country equally great in fable. Alas, the Zuider Zee, whose enclosure was commenced in 1932, will soon be no more, and in a few short years, Hans Brinker will be sorely pressed to use his silver skates in many parts of Holland. With these tremendous efforts, designed to simultaneously provide the Dutch with more usable land and improve the existing inland waterways with which the countryside is laced, the Dutch have continued to lift the curse and realize even greater benefit from the blessing.

Reborn Rotterdam— "Europort"

Rotterdam (which was leveled by the Nazis in World War II for "demonstration" purposes) has long been completely rebuilt and is moving stead-

1. FORTUNE, August, 1959, pages 124-125.

ily toward improvement of its harbor facilities to the extent that it has already earned the title of "Europort". The title is richly deserved; some 25,000 sea-going vessels representing 45,000,000 net registered tons, serve Europe through Rotterdam annually, as compared with Antwerp and Hamburg which, respectively, serve only about 16,000 and 18,000 ships representing approximately 32,000,000 and 24,000,000 tons. The port at Amsterdam has seen the installation, recently, of some of the world's largest and most modern dry dock facilities; while the relatively unfamiliar northern ship channels of IJmuiden, the focal point of Holland's steel producing industry and home of KNHS,[2] another European business behemoth, are being dredged and widened to accommodate the passage of the largest of ocean-going vessels which utilize the North Sea Canal.

None of this emphasis on water shipment has worked to the prejudice of railroad expansion. The unit of space provided by European railway freight equipment, or "wagons", as they are called in Holland, is still generally below that with which American shippers are familiar, but expansion of the aggregate number and types of units has proceeded at a pace well in keeping with the ability of Dutch industry (most of the rolling stock for Dutch railways is provided by the Utrecht plant of VMF)[3] to supply it.

Thus, through combined governmental and private industry efforts, the shipping, both oceanic and inland waterway, and railway freight facilities of the Netherlands have been rebuilt or enlarged to the point where they beckon to prospective users in a manner not dissimilar to that of the storied Lorelei in the neighboring Rhine.

Inter-city highway transportation, while more than adequate for supply purposes, and modernized by improvements such as the Velsen Tunnels (routed under the North Sea Canal to connect the Province of North Holland with the rest of the country) which were completed in 1957, is relatively unimportant to foreign industrialists considering the Netherlands as a business site in Europe, because the Dutch domestic market which would be served over the highways is not sufficient to sustain manufacturing operations. Notwithstanding the formation of the Benelux Union, *post*, which offsets, to some degree, the limited home market offered in Holland, most of the foreign manufacturing enterprises in the country were and will be located there to serve Europe, the Middle East, Africa and South America.

If we find the geographical location, temperate weather and magnificent transportation facilities possessed by Holland pleasing, then the remarkable economic climate existing throughout the country should provide additional stimulation for the selection of the Netherlands as a Eurosite for American business. It matters not from what viewpoint one scans the Dutch business scene; he is favored with as pleasant a portrait as any painted by Rembrandt or Hals. However, if one is to really appreciate a painting, he must look outside the picture and into the artist, and when we do so in the case of Holland, we find a government and people possessed of an uncanny sense of foresight coupled with an appreciation of the necessity for unselfish introspection, the latter being a unique quality in the age-old European game of power politics.

Its geographical location produced an early economic structure in the Netherlands with a front turning inexorably outwards; and with the limitations imposed upon it by size, it was only natural that Holland first became best known for international service-rendering such as trade, shipping, banking and insurance. Yet, since the second half of the last century, Holland has come into rank with Germany and Belgium as the most highly industrialized of the European nations, and now looks to industry as its most important means of existence. Can the change be accounted for by purely demographic factors? For the answer, we must turn to the sense of foresight possessed by Holland as it played its role during and after both World Wars.

Holland's activities in the post World War I era perhaps have value

James N. Johnson is a native of Stevens Point, Wisconsin. He was graduated from the Cornell University School of Law in 1943 and was admitted to the Wisconsin Bar in the same year. His practice has given him considerable experience in negotiating with foreign industrialists and governments.

now only to the historian, and we need not spend much time with them; but it is interesting to observe that even then her statesmen were among the pitiably few who responded favorably to the call by Aristide Briand, of France, for a united Europe. It was not strange to the Dutch (because of their familiarity with world trade conditions) that the economic fragmentation of the old continent continued to be the principal hindrance to its economic development; but the Dutch knew also that the concept of European unity is multi-ordinal, one which is dependent not only on economics but, equally as important, on political, military and cultural considerations. The importance of the interplay between these various factors had precluded unity in Europe since the very day of its earliest espousal by the

2. Koninklijke Nederlandsche Hoogovens en Staalfabrieken N. V. (Royal Netherlands Blast Furnaces and Steelworks), a Dutch corporation owned in part by the Dutch Government and the City of Amsterdam, and which is ranked ninety-seventh in *Fortune's* one hundred largest foreign industrial corporations. The relatively low ranking is the result of reporting only partly consolidated earnings. A complete consolidated report (from the eleven other companies of which KNHS owns a part) would catapult KNHS toward the top of the list.

3. Verenigde Machinefabrieken N. V. (United Engineering Works) the holding company for Koninklijke Manchinefabriek Gebr. Stork en Co., N. V. and Werkspoor N. V.

Frenchman, Pierre Dubois, *circa* 1300; and the Dutch, because of their size, could do nothing about it except applaud those visionary but abortive efforts such as the Pan-Europe movement founded in 1926 by the Austrian, Coudenhove-Kalergi and, again, the European Union presented to the League of Nations in 1930 by Briand.

Therefore, and to the extent their influence could be felt, the Dutch refused to await the end of World War II, which they knew would be accompanied by a natural wave of Jingoism, to take up the subject of unity. In 1944, the Dutch called upon the existing Belgium-Luxembourg Economic Union, for common consideration of the problems to be faced by the three nations in the post-war era. The result of the conferences was the formation of Benelux[4] in 1948, and with it the laboratory for the subsequent "unity movements" in Europe was born. Benelux was followed, most immediately, by O.E.E.C.,[5] also formed in 1948, to administer the Marshall Plan; then by the Council of Europe[6] in 1949; the European Coal and Steel Community[7] in 1952; the European Defense Community[8] in 1954; "Euratom"[9] in 1957; and, finally, the European Economic Community[10] (better known as the "Common Market" or "Euromart") in 1958. The Netherlands Government supported and played a leading part in the formation of each of these "unity" movements; but, the most important of the various unifications, has been the Common Market into whose formation the Dutch marched proudly, notwithstanding adherence to some of its theories will cause them serious disadvantages from an external tariff aspect.[11] This adherence is an excellent example of the unselfish introspection to which we have referred earlier.

The Common Market has been made the subject of many articles in legal and business periodicals published throughout the United States. To refer to it at length here would serve no good purpose; but the formation of the Common Market resulted in a purchasing potential of 160 million people, free to move, free to work and free to buy. Unification, so earnestly sought by the Dutch for so long, became imminent and with that unification in sight, the Dutch facilitated their legal, taxing and fiscal affairs to permit full participation in the Common Market. The result has been the remarkable economic climate so attractive to American business and which demands our further examination.

A Modern "Land of Milk and Honey"

When considering any type of foreign base operation, the first apprehension to assail the businessman is "red tape". Our own federal and state governments surround us with such a tremendous mass of regulations that one cannot be too harsh with the client who recoils in horror at the suggestion of investigating the possibility of a foreign manufacturing base. In this respect, Holland is the modern land of milk and honey.

Foreign companies desiring to establish an industrial operation in the Netherlands need only one permit, for which only one application is made to only one agency.[12] On the strength of this single permit, The Netherlands Bank—the central bank of the Netherlands—will issue the necessary foreign investment license.

Applications for an investment permit require only a minimum of information on the nature and size of the project, with the following data of particular importance: the nature and legal form of the enterprise to be established and the products it will manufacture; estimated development of annual net sales of the Netherlands company or, in case of export, estimated development of export sales and a list of the countries to which the products are likely to be exported; the estimated number of workers to be employed; the amount and origin of the capital needed to attain the amount of estimated annual net sales; the form in which the capital is to be supplied (the amount of shares or bonds, with indication of interest rate and redemption plan, bank loans, etc.) and the form in which the capital is used (a list of the assets needed for commencing business); the form in which the capital will be paid in (cash, equipment, etc.; cash payment will be accepted in convertible currency only); and an estimate of annual foreign currency requirements with an itemized justification (import of materials, parts, transfer of profits, etc.).

This one investment permit entitles the holder, automatically, to all benefits regarding the transfer of profits and repatriation of capital under the legal regulations promulgated by The Netherlands Bank.

In investigating a foreign base manufacturing operation it becomes important, just as it would with respect to a domestic company, to be aware of the nature and type of business organizations available. Here again, Netherlands law offers and distinguishes various simple forms of business enter-

4. Benelux Union, a customs union to which Belgium, Luxembourg, and the Netherlands are parties signatory. Between 1948 and 1954, customs duties between the three countries were abolished and a common external tariff was established. Since 1954, even capital transactions between the Benelux countries have been made largely free.

5. Organization for European Economic Cooperation; to which Austria, Belgium, Denmark, France, West Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Sweden, Switzerland, Turkey and the United Kingdom are parties signatory. Spain, Canada and the United States became associate members. It was expected, originally, that O.E.E.C. would form the basis of European unification. This hope soon vanished; but O.E.E.C. did succeed in creating the European Payments Union which has established mutual convertibility of European currencies for purposes of trade and capital movements.

6. Organized by the O.E.E.C. countries, other than Portugal and Switzerland, to discuss common problems and make recommendations to the member governments. It is an unwieldy organization which proves to be of no practical importance.

7. This organization integrates the coal, iron, steel and scrap market for the Benelux countries and West Germany, France and Italy. It is generally regarded as the most immediate forerunner of the Common Market because its members are the same.

8. Formed by the Benelux countries, West Germany, France and Italy to unite their military resources. After preliminary executive agreement, the French Parliament rejected the idea.

9. The plan submitted by France, in partial substitution for the European Defense Community, with the purpose of stimulating the rapid growth of nuclear industry in Europe through providing means for free exchange of information and promoting research and investment.

10. Organized under the Treaty of Rome on March 25, 1957, by Belgium, West Germany, France, Italy, Luxembourg, and the Netherlands. It is a far-reaching agreement of high principle and practical consideration. Its principal weaknesses lie in the special provisions extended to France within the Treaty and in the fact, outside the Treaty, that the United Kingdom and the Scandinavian countries refused to participate.

11. The Common Market countries have agreed that they will adopt a uniform external tariff, which is to be computed as the arithmetical average of the six participating countries, with the result that, in several instances, Holland will be required to adopt "protective" tariffs where it has had none.

12. Directorate-General for Industrialization and Power Supply of the Ministry of Economic Affairs, 30 Beguidenhoutseweg, the Hague.

prises. The most important of them are the *naamloze vennootschap* (a limited liability company or corporation) and the *vennootschap onder firma* (a partnership). Firms of any size, particularly those in which foreign capital is invested, will, on the whole, find the corporation better adapted for their use.

The main features of a Dutch corporation deserve examination because in some respects they differ from American corporate enterprises. The capital of a Dutch corporation has to be furnished by at least two persons or corporations and is created in the form of shares of a stated (or what we know as "par") value, in guilders.[13] Shares without par value are unknown to Dutch law. After the corporation has been legally established, one person or company may hold all the shares. The corporation can function, *sui generis*, in legal proceedings; and, as in the United States, its debts are recoverable only from its own property so that shareholders are not liable for them privately.

A corporation is established by notarial deed (a document to be prepared by a notary public, an officer in the Dutch legal structure whose functions have meaning and substance) containing the articles of incorporation. The provisions of the articles of incorporation must comply with certain minimum legal requirements, and compliance is declared when a certificate of incorporation is issued by the Minister of Justice.

In a Dutch corporation, as a rule, the shareholders, the managing directors (comparable in some degree to officers of an American company but much more powerful) and the board of directors, have separate and distinct functions. The articles of incorporation regulate the relations between these bodies within the limits imposed by law. The main task of the managing directors is the conduct of the day-to-day business, while the board of directors is generally charged with the supervision of the management.

It is a general principle that the highest power in the corporation is vested in the annual general meeting of shareholders where each shareholder has the right to vote. For this reason, any articles of incorporation which aim at transferring this power to other bodies within the corporate structure or to bodies or persons outside the corporation are only permitted by way of exception. There are, however, methods to achieve this displacement of powers, as for example, the creation of holding companies which owe their significance to the proportional voting rights laid down by Netherlands law. This proportional voting right is one aspect in which Dutch company law varies from that with which American corporate lawyers are familiar. Under that right (which arises only when the capital stock is divided into shares of different stated values) the number of votes of each stockholder is equal to the number of times the stated value of the smallest share is contained in the total number of his shares. Another principal difference between an American corporation and a Dutch corporation exists within the concept of the Dutch term "managing director". We have observed, above, that in some degree they are similar to the officers of an American corporation, but in certain areas they differ substantially. They are appointed directly by and remain responsible only to the shareholders; it is not uncommon for managing directors to demand and receive a share of the profits of a company; and, most important, any managing director (even when there is more than one) can, on his signature alone, unless actual notice is given to the contrary, sell, mortgage or otherwise encumber or transfer all of the assets of the company.

Dutch Company May Be 100 Per Cent Foreign Owned

One of the principal advantages inherent in a Dutch corporation, as opposed to those organized in Switzerland (which is neck and neck with Holland in the race of European nations to establish conditions attractive to foreign investment), is that which permits complete freedom from appointment of Dutch nationals to any managerial or official position in the company. Neither are there any legal provisions requiring maintenance of any ratio of foreign to Netherlands equity capital. A Dutch corporation can be one hundred per cent foreign-owned and managed. Such a policy is not necessarily wise, but if conditions suggest that it be observed, Dutch law allows it.

The comparatively recent emphasis of the Dutch on industrialization has not interfered with their first love, banking and finance. As one might expect, the emphasis on the former has provided new impetus for the latter, and sources of financing are similar to those with which American corporate finance officers are familiar.

In a Netherlands corporation, capital can be raised by the issue (private or public) of shares in the Netherlands. Shares issued in the Netherlands may be made marketable and may be quoted on an exchange, if the share capital amounts to at least fls. 500,000. Quotations as well as dividends are, as a rule, expressed in percentages of the par value. Applicants for commercial loan financing will find that commercial banks will, only in few cases, grant large, long-term credits for terms in excess of two years. Therefore, such loans must be referred to either the National Reconstruction Bank in which the Netherlands Government has an interest, or the Netherlands Participation Company which has been established by the National Reconstruction Bank and the biggest commercial banks of the Netherlands.

The Netherlands Participation Company is chiefly engaged in participations, whereas the National Reconstruction Bank grants long-term investment credits. Furthermore, mortgage-loans can be made through mortgage banks and insurance companies. The usual term of this type of loan is from five to ten years, although longer periods are occasionally granted.

It is the general policy of the Dutch Government, with respect to foreign-owned companies, to require the total

13. The current (October, 1959) official foreign exchange rate of the florin (guilder) is $0.2650-¼, and the par rate is 3.80 guilders per United States dollar; this amount may be taken as valid for preliminary investigating purposes notwithstanding the publication date of this article, because the Dutch guilder is one of the most stable of all currencies and does not vary more than a few percentage points from day to day in its selling price for bank transfers.

amount of loans from local sources to be less than the total foreign capital invested; but, exceptions to this rule are possible. Ordinary bank credits may be obtained for temporary capital needs, for which the banks generally require as security, unmortgaged buildings, equipment, stocks and assignment of receivables.

A Realistic View Toward Taxes

As is the case in any credit-risk transaction, the volume of credits granted and the security required, largely depend on the nature and importance of the project, the amount of the capital which is risk-bearing and the standing of the company involved.

While we have described the Netherlands as a "land of milk and honey" it is not completely without its hemlock. Taxes must and do exist, but there is a realistic attitude toward them which is most reassuring. The general taxation scheme, with respect to corporate enterprises begins, as it does in the United States, with franchise or registration fees which consist of: (A) two and one-half per cent on the capital paid in at the moment of the establishment; (B) one-quarter per cent on the capital subscribed but not paid in at the moment of the establishment; and (C) two and one-quarter per cent on any subsequent payment of the subscribed capital mentioned under (B); which means that the total registration fee will never exceed a total of two and one-half per cent of the subscribed and paid-in capital. These fees can be obviated to some degree by reducing the amount of equity capital to be used and increasing the debt capital, although interest charges might offset any benefit.

Corporation income tax is levied on the net profit of corporations incorporated under Netherlands law and all other corporations incorporated in the Netherlands as well as non-resident or foreign corporations operating in the Netherlands through a permanent establishment or a permanent representative. However, before calculating taxable profits, the following possibilities of depreciation, deductions, compensations and reserves may be considered.

(1) *Normal write-offs.* The Netherlands authorities have adopted the theory of the historical cost price,[14] which means that the original purchase costs are the basis for writing-off of capital equipment. For capital goods a permanent method must be used, such as writing-off a fixed percentage of the purchase or book value.

(2) *Accelerated write-offs.* On new investments made after January 1, 1959, one third may be written off at an accelerated rate. For the first year, the rate is limited to sixteen and two thirds per cent.

(3) *Deduction for new investments.* It is permitted to deduct from the profits, during a period of two years, sixteen per cent (8 per cent per year) of the amount spent on new investments made after January 1, 1959, provided these investments exceed fls. 3,000.

(4) *Compensation for losses.*

(a) Losses sustained during the first six financial years from the formation of a corporation may be set off against profits made in any other year.

(b) Losses sustained after the six-year period mentioned under (a) may be compensated with profits, if any, earned during the six following years.

(c) Losses sustained in a certain year may also be deducted from the profit of the previous year.

(5) *Deduction for special reserves.*

(a) *Maintenance reserve:* One which is used to spread the maintenance cost of assets evenly over their lifetime by transferring yearly a constant amount from the profits to a maintenance reserve account, which account is debited with the actual costs.

(b) *Self-insurance reserve:* One which may be created to cover (to some extent) risks which normally would be insured.

With these factors in mind, we can examine Dutch corporate income tax rates with less repugnance. They are not dissimilar to those of the United States federal income tax, and amount, at this writing, to a maximum of 47 per cent of the taxable sum or, in case this sum is less than fls. 50,000, to 44 per cent of the taxable amount plus 15 per cent of the sum by which the taxable amount exceeds fls. 40,000. Once again, however, the realistic Dutch provide a *deus ex machina*, because it is possible for a foreign base manufacturing operation located in the Netherlands to negotiate an agreement with the fiscal authorities, whereunder the sales of the manufacturing unit are made at a nominal taxable price to, let us say, a Swiss sales subsidiary which, in turn, makes the sale to the ultimate customer and pays only the extremely low Swiss income tax. There is no tax, Swiss or Dutch, on the transfer of dividends from the Swiss sales subsidiary to the Dutch manufacturing unit, but the general subject of a dividend transfer tax does bear some explanation.

Generally speaking, a dividend tax at the rate of 15 per cent is levied from shareholders receiving dividends from Netherlands corporations. This tax is withheld by the company paying the dividend and is usually set off against the income tax or corporation tax due by the shareholding individual or corporation. A realistic exemption from this tax has been provided for in the case of subsidiary corporations. Under that provision, dividends paid to resident corporations which, for at least twelve months, have owned a quarter of the capital of the company paying the dividend are exempt from this tax, provided that, during the preceding twelve months, the two companies have not mutually held each other's shares.

Two Other Taxes— Turnover and Property

Two other forms of taxation are important enough to warrant mention in this general reference to the subject. A turnover tax is levied on every delivery of goods by a manufacturer or intermediary to any other manufacturer, intermediary or consumer.[15]

14. Historical cost is the customary basis for depreciation for tax purposes in the United States as it is in Holland; but in Holland, and Europe generally, industry literally keeps two sets of books, one for computing cost for tax purposes which is referred to as "fiscal cost"; the other for computing cost for resale purposes which is referred to as "commercial cost". In fixing "commercial cost", depreciation is computed on the basis of replacement value.

15. In those instances where a Dutch corporation engaged in manufacturing operations owns a majority of the shares of a subsidiary company to which goods are delivered by the parent, Dutch Company Law is correlated with the turnover tax provisions to the extent that there is said to be a "fiscal unity" between the parent and the subsidiary. In such cases the turnover tax need not be paid.

Varying rates are applied to a maximum of 5 per cent; whereas, for luxury goods rates up to 20 per cent exist. In cases of imports, normal rates may be augmented by 5 to 6 per cent. No turnover tax is payable on delivery of textile goods, delivery of merchandise by the retail trade to the consumers and for export transactions. In the event goods or raw materials are exported or re-exported from the Netherlands, the turnover tax paid on these items at various stages of production and delivery preceding the export will be refunded upon request. There is also a property tax levied in Holland. Its paucity is encouraging; it consists of one quarter per cent of the sales value of the property and the concept of "sales value" is negotiable. Indeed, the existence of a property tax is almost entirely obviated if the plant is located in non-industrialized areas[16] which offer payments of up to $19.85 per square meter of productive floor space for plants having an area exceeding four thousand square meters and who employ at least one worker per one hundred square meters.

Finally, in order to prevent double taxation, tax conventions have been concluded between the Netherlands and: United States of America (1948); United Kingdom (1948); Norway (1950); Switzerland (1951); Belgium (1933); Sweden (1952); France (1949); Finland (1955); Canada (1957); Denmark (1957); Western Germany (1958); Italy (1957). We should pause here to point out a warning to those American business enterprises which have employed the overpopular Venezuelan or Panamanian "profit sanctuary" companies for other purposes. The use of such subsidiaries as a conduit to form a Dutch manufacturing company will ultimately result in the imposition of at least the 15 per cent dividend transfer tax because of the absence of Holland's tax conventions with Venezuela and Panama. In such cases, maximum benefits can be realized only through creation of a new and independent Dutch subsidiary.

Now that we have observed that it is possible to keep a substantial amount of the money earned by a Dutch manufacturing operation, it is a natural inquiry to speculate on whether and in what manner those earnings can be transferred to the American investor. Retransfer of capital invested in Holland, or the profits thereon, is a simple procedure.

Non-residents having invested capital in an enterprise established in the Netherlands are permitted to retransfer the proceeds of their participation, in case of sale or liquidation of the enterprise, provided: (a) the retransfer is effected in the same currency as originally paid to the Netherlands and the remittance is made to the country in which the investor was resident at the time the investment permits were obtained; and (b) the proceeds have been fixed according to good business practice. In general, dividends paid on Netherlands shares are transferable in the currency of the foreign investor's country and may be made without license, if the shares are officially quoted on a Netherlands Stock Exchange, or, if not so quoted, the dividends do not exceed 20 per cent per annum. In all other cases, a special license is required, which will, in principle, be granted for dividends paid out of actual profits and fixed according to good business practice so as not to constitute a transfer of capital.

License fees and royalties may be transferred freely provided the transfers concerned are based on officially approved license agreements.

Netherlands subsidiaries of foreign companies may be permitted to transfer money to their parent companies to reimburse the latter for reasonable expense incurred for services in general or for research work performed for the subsidiary's benefit.

No European government can or will extend protection to foreign investors against losses sustained by reason of confiscation or expropriation. Losses of this nature are only a minimum risk in Holland; but they can be insured through the I.C.A.[17]

It should be abundantly clear by now, that doing business in the Netherlands is a happy venture; but there are even more apples on the tree. It appears that even the labor leaders have been infected with the driving impulse to exert that unselfish introspection so characteristic of the Dutch. Unions, as they are known in the United States, do not exist in Holland. There are labor organizations which engage in collective bargaining, but the Dutch Government has always been a party to the negotiations and, through its Board of Conciliators, has been able to effect agreements which must be hailed as noteworthy for the degree of labor peace (only 35,000 man days were lost in 1958 through strikes) they have preserved. The conditions pertaining to the metal-working trade are typical of the Dutch labor scene and will serve to demonstrate the realistic attitude of Dutch labor conditions. The normal work week is forty-eight hours, consisting of eight and one half hours on Monday through Friday, and five and one half hours on Saturday. Time and one quarter, time and one half and double time are provided for when hours worked daily are in excess of those termed "normal". In multiple-shift plants, workers are rotated and all receive the same shift differential. All employees receive twelve days' paid vacation and six paid holidays annually, plus receiving varying amounts of paid time-off for marriage, wife's confinement, death of a spouse, voting and other personal requirements. Wages are frugal but just, and although they vary from municipality to municipality in accord with the cost of living, they are still the lowest in the Common Market. For example, the straight time hourly wage (not including social benefits such as workmen's and unemployment compensation, old age insurance and the like, provision

16. *Groningen Province:* Delfzijl, Groningen, Hoogezand, Leek, Stadskanaal, Nieu-Buinen, Ter Apel, Veendam, Winschoten. *Friesland Province:* Bergum Dokkum, Drachten, Haarlingen, Heerenveen, Kootstertille, Leeuwarden, Lemmer, Oosterwold, Sneek, Wolvega. *Drente Province:* Assen, Coevorden, Emmen, Hoogeveen, Klazienaveen, Meppel, Roden. *Overijssel Province:* Hardenberg Kampen, Zwolle. *North Holland Province:* areas to be designated later. *Zeeland Province:* Goes, St. Maartensdijk, Terneuzen, Zierikzee. *North Brabant Province:* Bladel, Cuyk, Etten, Oss, Uden. *Limburg Province:* Panningen, Venray, Weert.

17. The United States Government offers to new American investments abroad, insurance protection against the risk of inability to convert foreign currency receipts into dollars and against the risk of loss through confiscation or expropriation. Application for such coverage should be made before committing funds to foreign investment. The appropriate information should be submitted to I.C.A. Industrial Guaranties Division, Washington 25, D. C.

for which is made under Dutch law and which aggregate about 27 per cent of wages) for skilled workers, ranges from about forty-one cents an hour in Amsterdam to thirty-eight cents an hour in the smaller towns. Salaried office personnel receive a minimum of from eighteen dollars per month (for a fifteen year old employee engaged in routine work) to one hundred fifty dollars per month for male employees, forty-five years of age or over, engaged in office work requiring special knowledge including correspondence in foreign languages. These are minimums; but they perform an unusual function because the maximum total amount of salaries paid in each category may not exceed 15 per cent of the total minimum in each category. June, 1960, saw an approximate 10 per cent increase in wages, including the social benefits referred to, and a partial change in the role played by the government in wage-regulating functions; but the government continues to require wage increases to be justified.

We have stepped back, figurately, now for a few moments to observe the Dutch business scene with impartial perspective. From any viewpoint— climate, transportation, government interference or assistance, business organizations available, financing, taxes, repatriation of capital and earnings, labor costs and conditions—the scene leaps from the canvas begging to be embraced. One more area of investigation appears to be necessary to complete our perusal. How about the artist's personal life? Can we point to our portrait with pride, or need we be concerned lest the pigment fade and the whole picture lose its vitality because the artist was less than honest in any of his work. There need be no such apprehension when Holland is our artist. High standards of commercial morality and individual honesty are the traits which have enabled the Dutch to occupy, for centuries, a position in world trade far out of proportion to their size and productive capacity. If you can get a Dutchman to give you his word (this is not always easy), he will stand on it without equivocation. They are an uncomplicated and direct people who believe in hewing to the line once that line has been established. Therefore, the only caution to be observed, is one which suggests that we resist the temptation to paint with a broad brush and supplant it with a firm determination to fix a satisfactory line of understanding; because the Dutch, as any good businessman would, will insist that your obligations, and theirs, be complied with to the letter.

It is unfortunate that the confidence which the Dutch and any American businessman contemplating an operation in Holland, can derive from the Dutch economic climate is now being imperiled, at least with respect to business conditions in Europe itself, by a rebirth of the continental power and economic politics with which the Dutch have been embattled for so long. Amazed at the success which the Common Market countries have attained (notwithstanding that the affection of the Europeans for officialdom is evidenced within the administration of the Common Market, itself, *e.g.*—in excess of 1500 people are now employed in the various administrative offices of one kind or another) and fearful of the economic impact which the ultimate success of the Common Market might have, the United Kingdom and the Scandinavian countries, along with Switzerland, Portugal and Austria, have formed a European Free Trade Association to operate alongside the Common Market. Now that the "outer-seven", as they are known, have adopted their own association and engaged the Common Market countries in economic battle on the Continent, one of two results will soon obtain. The pressure applied by the outer-seven may cause France to reconsider its objections against a unification movement which would incorporate an all-Europe grouping, with the result that the two blocs may merge. On the other hand, because the European Free Trade Association Convention does not contemplate the imposition of a common tariff wall against those outside the Association, the common external tariff required, under the Treaty of Rome, to be adopted by the Common Market countries, may prove so disastrous that the entire Common Market scheme may have to be amended or suffer collapse. During the time it will take to determine whether one or the other of these results is becoming imminent, the nations of Europe, partly against their own intentions, will remain divided. As they have in the past, the Dutch in particular, and the Benelux countries, generally, will strive incessantly toward the goal of complete economic unity for Europe. The politics to be played in this interim will be largely those of France, Germany and the United Kingdom. It is an old game to the Dutch, and throughout the centuries in which they have observed other European nations coming several times to the brink of national bankruptcy, the Dutch have maintained a social and political neutrality which enables them to avoid entanglement in the enmities evidenced by any of the larger countries toward another. This socio-political neutrality has consistently enabled the Dutch to serve any two or more of the dissident factions simultaneously, even during those post-war periods which one would not do business with any of the others. That single fact is probably the most compelling reason for selecting the Netherlands as the place in Europe to do business.

Books for Lawyers

HENRY SIDGWICK AND LATE UTILITARIAN POLITICAL PHILOSOPHY. *By William C. Havard. Gainesville: University of Florida Press. 1959. $4.50. Pages 197.*

The author, an Associate Professor of Government at Louisiana State University who studied nineteeth-century political ideas at the University of London, has succeeded in contributing to the revival of interest in Arthur Balfour's brother-in-law, Trinity College's famed Professor of Ethics and Politics, Henry Sidgwick. Maitland long looked back upon him as one of the major influences in his intellectual life. The recent paperback republication of Sidgwick's *Outlines of the History of Ethics*, an enlargement of his famous *Encyclopaedia Britannica* article, is but another indication of the renewed interest in the subject of this book.

It is quite fitting that a study of this nature should have been undertaken because of its pertinency for the political and legal milieu of today. Sidgwick was the last of the great line of utilitarians who stemmed from Bentham and James Mill, with modifications in John Stuart Mill. Finally, at the height of Victorianism, utilitarianism veered to a marked alteration of the laissez-faire foundations of British liberalism through a synthesis of the utilitarian emphasis and a critical collectivism in the works of Sidgwick that presaged much of the developments in the twentieth century.

The author finds "a tendency to ignore both the influence of utilitarianism on other systems of thought and the persistence of utilitarian doctrines as the basis for the practice of politics in the later liberal (and collectivistic) state. These oversights might have been corrected if more attention had been paid to Henry Sidgwick, the last philosopher in the direct line of the utilitarian tradition."

Attention to him would have revealed one who lived a "full and useful life", ably assisted by his wife and who was "among the last of the universal scholars". The author aptly sums up their lives: "For the Sidgwicks not only lived a close approximation to the classical ideal of the good life, they taught a great many others to do the same."

He was a clear, scholarly thinker, author of one of the classics of English thought, *The Methods of Ethics*, a pioneer, fervent advocate of higher education for women and a frequent contributor toward Newnham College for Women as well as toward a readership in law for Maitland.

But it is in his critical, synthetic theories that he is of most concern for us. The author shows that he did not slavishly follow Benthamism nor look without misgivings upon much of positivism. "Sidgwick is basically opposed to these attempts to erect a monolithic structure in which the use of a single science or a single methodology drawn from a particular science is taken as the basis of ethics and politics." Like Russell in politics, ethics and philosophy of history or Boas in anthropology, he recognized a plurality of causes and, therefore, rejected "the psychologism of the Benthamites, the biological basis of Spencer's assumptions, and all other forms of historical positivism" because "they offer the practical difficulty of submitting individuals and societies to a state of external causality which he finds incompatible with the free moral and political development of man".

The author then traces the gradual influx of collectivistic thought starting from about 1870, a "new liberalism in which the state's active interference in the economy is accepted as a valid function . . . a modification of economic beliefs resulting from an odd assortment of critics, including Carlyle, Kingsley, Mrs. Gaskell, Comte and John Stuart Mill. . ." Sidgwick played a part in this swing of the pendulum as is evidenced in his chapter on "Justice" in *The Method of Ethics*. He weighs the intuitive claims of the individualistic ideas as against the socialist ideal. When one considers how long this conflict was waged within English liberalism, for now almost a century, one can but hope for a twentieth century Sidgwick who can weigh anew the alternatives and help swing back the pendulum from the present extremes of collectivisms of all varieties to the more balanced position of Sidgwick for whom a compromise between laissez-faire individualism and collectivism "was based on the primacy of his ethical end—the greatest happiness".

LESTER E. DENONN

New York, New York

SOCIAL CLASS AND MENTAL ILLNESS: A COMMUNITY STUDY. *By August B. Hollingshead, Ph.D., and Fredrick C. Redlich, M. D. New York: John Wiley & Sons, Inc. 1958. $7.50. Pages 442.*

The more carefully one reads this book, the more one calls to mind the "research" satirized by Swift in his description of Gulliver's visit to the Grand Academy of Lagado during his third voyage.

This book reports the results of a ten-year research project by a Yale University group of sociologists and psychiatrists who studied the greater New Haven, Connecticut, community. The alleged important new findings of this study concern a question posed by the authors: "Is mental illness related to social class?"

According to the authors, this question is related to the etiology of mental illness. The alleged findings of this study indicate, with numerous reservations by the authors, that the lower the social class, the greater the proportion of psychotic patients, and that this is especially true of the lowest socio-economic class. From this the authors infer "that the excesses of psychoses from the poorer area is a product of the life conditions entailed in the lower socio-economic strata of society".

This discussion will comment on two limitations of this study: (1) the poor handling of the question of diagnosis,

and, (2) the incorrect interpretation of the data.

There are three variables involved in the discussion of the question "Is mental illness related to social class?" They are the concepts of social class, relationship and mental illness. As to the variable of social class, the authors determine a person's social class by the use of objective data such as occupation, education and residential area. Accordingly, one can evaluate their work on this variable. Some errors in their handling of another variable, the etiological aspects of this relationship, will be discussed *infra*. As to the other variable, mental illness, the authors have not offered proper objective data to validate their alleged findings. For crucial to the validity of this study are the correct diagnostic determinations of (A) whether a person is normal or mentally ill; and (B) if mentally ill, is the person neurotic or psychotic?

A. For the purposes of this study, the authors have assumed that whatever any psychiatrist decides is mental illness and then decides to treat is thereby validly determined to be mental illness. In my opinion, by basing the alleged findings on etiology on this assumption, the study has invalidated its findings. For it has disregarded a material fact that almost might be entitled to judicial notice. This fact is that competent psychiatrists can, and do, honestly differ with varying frequencies as to (1) whether a person is normal or mentally ill, and (2) if mentally ill, whether he should be treated. Furthermore, that the authors are not unaware of this fact can be seen from statements such as "All too often they [psychiatrists] cannot agree on the question of whom to treat, when to treat and what to treat."

B. The authors readily admit that the diagnosis of psychosis versus neurosis is often difficult, and even say that "we will not attempt the ungratifying task of defining neurosis and psychosis. . ." In spite of this difficulty, of the 1,891 persons who were patients of the psychiatrists included in this study, the authors diagnosed exactly 1,442 persons as psychotic, exactly 449 persons as neurotic and exactly no one as borderline.

The methods used to make these oft-times difficult diagnoses so exacting involved an interesting procedure wherein no patient studied was ever personally observed, interviewed or examined by any member of the research group. A group of psychiatrists reviewed the data obtained either from the patient's psychiatrist or from the patient's medical record. These data were compared with the treating psychiatrist's diagnosis. While the reviewing psychiatrists' diagnosis made from second- or third-hand data usually agreed with the treating psychiatrist's diagnosis, it occasionally did not. In these cases of disagreement, the diagnosis was changed to that made by the reviewing group. Normally the observing, interviewing and examining of a psychiatric patient is a *sine qua non* of making a valid psychiatric diagnosis. Accordingly, in my opinion, this study's findings are further invalidated by the basing of its findings on diagnoses made in every case by a group of psychiatrists who never saw any patient whose illness they diagnosed.

The importance of the reliability of every diagnosis is that slight changes in diagnostic results would have statistically significantly altered any alleged finding as to etiology made by this study; however, even if these data were reliable, the alleged findings of this study are invalid because the data have not been properly interpreted.

If the data were reliable, this study would be valid if it had studied incidence, *i.e.*, the number of new cases of mental illness occurring in a social class within a certain period of time. Instead it has studied prevalence, *i.e.*, the number of cases of mental illness, old and new, existing within a social class within a certain period of time. The use of prevalence would have been valid if the prevalence-incidence ratio of psychoses were constant; however, from the authors' own data, this ratio varies from 7:1 in the highest social class to 20:1 in the lowest social class. Obviously, this is a statistically significant variance.

Furthermore, as the authors admit, the data on prevalence are only on partial or treated prevalence rather than on total or true prevalence. For only those mentally ill persons being treated by a psychiatrist, mental health clinic or mental hospital during the six-month period studied were included in the study. If a person was mentally ill and if he was being treated for his mental illness by a physician who was not a psychiatrist, or if he was not being treated at all, this person was not included in the study; therefore, these data only reveal how a person enters, re-enters and remains under the treatment or custodial care of a psychiatrist. Accordingly, the alleged findings of this study relate not to the etiology of mental illness, but rather to the other problem studied by the authors, that is, the type of treatment received by mentally ill patients from the various social classes. For detailed criticism of the statistical aspects of this study, the interested reader is referred to a brilliant and devastating review of this book by Goldhamer in the December, 1959, issue of the *American Sociological Review*.

In summary, while it may certainly be true that social class has a significant etiological relationship to mental illness, it definitely has not been proved or even properly suggested by this study.

In conclusion, I believe that this book is typical of too many studies now being published which claim to be advancing our knowledge of mental illness. Furthermore, on the basis of the alleged new findings made by these studies, these studies are often used by those who advocate certain changes in the law. In reality, however, these alleged findings, as well as the advocated changes, represent only the personal opinions of the authors which are of greater or less validity, rather than any new scientific knowledge.

MORTON BIRNBAUM, M.D.
New York, New York

LANDMARKS OF LAW: HIGHLIGHTS OF LEGAL OPINION. *Edited by Ray D. Benson. New York: Harper & Brothers. 1960. $8.50. Pages xiv, 461.*

This is an anthology of outstanding essays on the nature of law and other jurisprudential matters, as well as on more concrete legal subjects such as the right to privacy, the right of publicity, the early history of insurance law, the personality of association, per-

petuities, community property, principles of tort, the right to compensation for an idea, and the Lewis and Clark Expedition papers case. That star on the firmament of American jurisprudence, Oliver Wendell Holmes, is represented by three different items, including his classic, *The Path of the Law*. Among the other loan pieces from the field of the philosophy of law are John Dewey's *Logical Method and Law*, Sir Paul Vinogradoff's *Legal Standards and Ideals*, Roscoe Pound's *Mechanical Jurisprudence*, Edwin W. Patterson's *Logic in the Law*, and Arthur L. Corbin's *Legal Analysis and Terminology*. Included also are Roscoe Pound's inquiry into "The Causes of Popular Dissatisfaction With the Administration of Justice" and Lon L. Fuller's "The Case of the Speluncean Explorers", a masterpiece of legal fiction, deeply penetrating from a lawyer's point of view, yet brilliantly written and wittily entertaining. And at the end of the anthology there is another spark of legal genius, Lord Buckmaster's "The Romance of the Law". No more need be said to justify the conclusion that this newcomer in the borderline zone of law and literature should be a valuable addition to every law library, public as well as private.

MAXIMILIAN KOESSLER

San Francisco, California

THE OPERATORS. *By Frank Gibney. New York: Harper & Brothers. 1960. $3.95. Pages 275.*

This book is a Baedeker of the bottom of the barrel. The author plunges his pen into apple after rotten apple, then displays each one for our consternation. It is almost as shocking as the morning tabloid.

It is Mr. Gibney's theme that today's genial society is making cheats of us all, that private morality is falling away from the law. Since he actually describes the various techniques, the book is also a practical guide to rascality. Your own clients may be reading it, so perhaps you had better read it too.

Generally, the book describes numerous examples of fraud, paying particular attention to the cosmetic and drug industries, fraudulent stock underwriting, the advance-fee real-estate racket, the personal injury industry, which is peculiarly ours, and corruption in government. Running through all the others is the federal income tax which, according to Mr. Gibney, is a virtual school for scoundrels. The I.R.C., he claims, encourages our more alert citizens to meticulously explore the tempting terrain of tax avoidance which is so closely bordered by the far more lucrative forbidden forest of tax evasion.

Much has been written by others about these problems. This book, however, is being promoted as "a portrait of the Genial Society in all its comfortable laxity" and, inferentially, as a how-to-do-it guide to petty larceny. On the cover, for instance, there is a picture of a fat wallet vomiting greenbacks. It is selling well. Many of its readers are being exposed to these ideas for the first time. But although it may encourage some readers to reach for the brass nickel, it is also likely to create a public desire for reform. What direction should such reform take?

Mr. Gibney calls for "a simplified tax rate and Draconian reductions in the special deductions". Other than that, he seems to hope that man will discover morality. Not much reform visible down that vista! In fact, history may reveal that man is never worse than when he thinks he is getting better.

But how about rational government regulation? Certainly tax withholding has reduced evasion in the lower income brackets. The SEC has all but eliminated the cruder forms of stock swindle. And several professions, including our own, are able to persuade their outright humbugs to fly away to other fields.

The problem in each case, although generalization is naturally hazardous, is to accurately identify the evil, then to pass such legislation as can actually reduce it and, finally, to effectively enforce the law.

Mr. Gibney cites Prohibition as an example of a law which was bad because it was aimed at a moral rather than a social end. I believe he is wrong. The present high federal tax on distilled spirits and the close regulation of the manufacture, sale and consumption of alcoholic beverages has the same moral end in view. The error was not in the aim. It was in passing a law which was impossible to enforce. Of course, my example suffers from an unfortunate malady, being impossible to prove. But when liquor is high priced and highly taxed, the dice, at least, are loaded in favor of temperance.

Or take the World War II black market economy, another hatching crib of immorality. The government attempted to enforce artificially low prices and a system of rationing. There were wholesale violations, caused not by a lack of popular sympathy but by impractical sanctions. If higher prices had included a stiff war-time tax on scarce items, free enterprise would have worked against dishonesty rather than with it.

But these examples no more disclose new ideas than does Mr. Gibney's book. I only urge that readers should not join in the hand-wringing of the author. The United States is now and ever shall be a nation of laws and, God willing, lawyers. Be they just and sensible laws, no harm can come. The burden, after all, is ours.

ROBERT COULSON

New York, New York

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION. *By S. A. de Smith. London: Stevens & Sons, Ltd. New York: Oceana Publications. 1959. $11.00. Pages xlvii, 486.*

In a 1950 review of a comparative study of English and American administrative law by the present writer, an acute English authority declared, "American administrative law is so much more developed than the British that there is little for the American lawyer to learn from British experience —except to be on guard against a weakening of judicial control. Cannot Marshall Plan Aid include 'administrative law'?"[1]

Today, a decade later, the same statement would hardly be made by a comparative observer. During the past ten years, administrative law in Britain has been, if anything, in an even greater ferment than on this side of the Atlantic. Nor has British concern

1. Street, Book Review, 59 YALE L. J. 590, 593 (1950).

with the subject been confined to academic study and report. On the contrary, there has been both official inquiry and action comparable to that which occurred in the period 1939-46 in Washington. In 1957, the Franks Committee on Administrative Tribunals and Enquiries (under the Chairmanship of Sir Oliver Franks, who is so well remembered as Ambassador during the war) issued a memorable report, after a thoroughgoing study. This writer, as one invited to appear before the committee, can personally attest to its acute interest and acumen. Of course, such a report is nothing new. The well-known Committee on Ministers' Powers had reported in 1932, but nothing practical had come of its efforts. This time, however, the Government moved to implement the Franks Report. The result was the Tribunals and Inquiries Act, 1958, which provides for certain basic reforms in English administrative procedure, including the setting up of a Council on Tribunals (the counterpart of the independent Office of Administrative Procedure which many of us have been working for—thus far without success —in this country).

It is the great progress that has thus been made in English administrative law in recent years that makes a book on the subject by a recognized authority of great interest to the American administrative lawyer. Dr. de Smith's work is, it is true, devoted only to judicial review. Yet this is the aspect that is of crucial importance both to the lawyer and from the constitutional point of view. For, let us not forget, it is judicial review that serves to maintain the rule of law in our system. In the late John Dickinson's words, "just in so far as administrative determinations are subject to court review, a means exists for maintaining the supremacy of law, though at one remove and as a sort of secondary line of defence".[2]

Dr. de Smith has divided his work into three parts. The first is an introductory part devoted to the place of judicial review in English administrative law and a classification of administrative functions.

The second part of the book deals with the scope of review in the English system. Here, the American will find much to interest him from a comparative point of view. The basic problems which confront our judges are also those which face their confreres on the other side of the Atlantic. Of especial interest are the discussions of law, fact and jurisdiction, and the fundamental problem of review of discretion. The treatment of the latter is more complete and enlightening than that in comparable American works. Also of note is the analysis of natural justice—*i.e.*, the British concept underlying their law of administrative procedure.

Part Three of the de Smith work treats of a subject which, at first glance, appears out of place in a field like administrative law—namely, that of forms of review action. Yet it is one which, largely for historical reasons, remains of basic importance to the practitioner. This is especially true of those concerned with administrative law in the states, for even today, in almost all the states, non-statutory review is secured by the prerogative writs or their modern derivatives. It is for this reason that American administrative lawyers will find de Smith's treatment of those writs of great value. His historical outline of the way in which the different remedies developed is of particular use. Interestingly enough, to the comparative reader, the prerogative-writ procedure has proved no more equal to the modern needs of a system of administrative law on the other side of the Atlantic than it has in this country. The gap here is being filled in by the injunction (much more limited in actions against the executive than with us) and the declaratory judgment. There has been a comparable development in the federal system here. The more preferable alternative—that of a simple, uniform review procedure by petition (which has been adopted in a few states)—has received no real attention in Britain.

Dr. de Smith's book is a solid, scholarly work, which speaks well both for its author and the legal system in which he works. De Smith himself is a leader in the younger generation of English administrative law scholars. Works like that under review published in the past few years indicate that, from the academic side, at least, the future of English administrative law need give us no concern.

BERNARD SCHWARTZ
New York, New York

THE MILITARY LAW DICTIONARY. *By Richard C. Dahl and John F. Whelan. New York: Oceana Publications. 1960. $6.00. Pages 224.*

This pioneering volume is added proof that military law has come of age, for when a branch of law merits its own dictionary, it is surely entitled to take its place with the other well-recognized sections of jurisprudence. But *The Military Law Dictionary* contributes more than merely status to its subject matter, for in its own right it makes a distinct contribution.

Of course, a dictionary lacks either theme or continuity. Its arrangement is predetermined by its very nature. Hence, it must be judged in accordance with its utility, and in this respect *The Military Law Dictionary* excels. Its definitions are at once clear and concise; its variety of entries is surprisingly large considering its handy compact size, and the style of type makes reference easy and invites research without eyestrain. A comprehensive list of thirty-seven pages of military abbreviations is a welcome guide through the maze of CSJAGA, EDCSA, DALVP and many more which permeate military law writing.

The definitions in this dictionary have been taken from approved sources. Many of them are obviously copied from the Uniform Code of Military Justice or the *Manual for Courts-Martial*. Others are no doubt derived from decisions of the Court of Military Appeals or boards of review. Probably still more come from approved regulations. Hence, all are of undoubted reliability and authority.

The authors do not list their sources under each definition. Such reference is customary in law dictionaries, and tends to enhance the utility of the work by permitting the lawyer to go to the original source and use that as well as the dictionary. Indeed, where the original source elaborates on the definition as found in the dictionary, illus-

2. Dickinson, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW 37 (1927).

trates it by a particular fact pattern, or contains a discussion of the rationale, the dictionary may serve as a useful conduit to this original source. It is hoped that in a future revision such source reference will be added.

This reviewer would also prefer a greater emphasis on substantive military law materials and matter which is peculiar to military law. Legal definitions generally are easier to find in standard law dictionaries than terms found only in military jurisprudence. To compensate for this lack, this reviewer believes that the authors would have been justified in concentrating on military jurisprudence and giving abbreviated attention to terms of civil or criminal law generally even if in use among military attorneys.

But the above preferences are primarily matters of personal taste and opinion. From an objective point of view, the authors have made a noteworthy contribution to military law and can look forward to widespread use of their labors among a growing body of military attorneys.

ALFRED AVINS
John Marshall Law School
Chicago, Illinois

HOW TO WRITE, SPEAK AND THINK MORE EFFECTIVELY. *By Rudolf Flesch. New York: Harper & Brothers. 1960. $4.95. Pages xi, 362.*

It is a rare phenomenon that an Austrian who came to this country at the age of 27, with German as his native tongue, a Doctor of Law degree from the University of Vienna, and at a rather advanced stage of his practical preparation for the Bar, engaged here in the study of American linguistics with such eagerness, penetration and efficiency as to become a recognized authority in this field so different from his legal background. This is the case of Dr. Rudolf Flesch who, in 1938, the year of Hitler's annexation of Austria, immigrated to the United States and in 1943 received his Ph.D. degree from Columbia University on the basis of a dissertation entitled "Marks of Readable Styles". He developed therein a formula for measuring readability, Psychology of reading and writing was already then, and still is, his special brand of linguistic research and analysis. And he has become one of the leading crusaders for simplification of style. There are bestsellers among his numerous publications which include *The Art of Plain Talk* (1946), *The Art of Readable Writing* (1949) and *The Art of Clear Thinking* (1951). Quite a few lawyers have been among his readers, a fact that is only natural in view of the strong trend toward converting *legal English*, in a deprecatory meaning of that phrase, into good and understandable English.

The book under review, in addition to certain brand-new features, includes in revised form a substantial amount of the material contained in previous publications of the author. It is a highly instructive, interesting and to a certain extent even entertaining presentation, but slightly suffers from the fact that it indulges in too many illustrations by long quotations and that it overemphasizes its purpose to teach.

A shortcoming which it has in common with other Flesch books where this is felt[1] even more is that the quotations are given with indication of the names of the authors only, without any reference to the particular sources.

MAXIMILLIAN KOESSLER
San Francisco, California

THE FEDERALIST. *A Classic on Federalism and Free Government. By Gottfried Dietze. Baltimore: The Johns Hopkins Press. 1960. $6.50. Pages 378.*

This book comes at an auspicious time, with the world struggling for means of self-control. The following is taken from the foreword: "The present study attempts to analyze the Federalist as a classic on federalism and constitutional democracy. It tries to show the contribution of the work to the literature on federal government by demonstrating how the essays advance beyond the orthodox conception of the purpose of federation, by advocating federalism not only as a means for maintaining the security of the federating states from foreign powers or peace among the members, but also—and especially—as a means for securing the individual's freedom from governmental control. Federalism is thus elevated to a form of constitutionalism. It will be shown that the authors believed in the constitutional ideal of free government. This ideal implied to them a popular government which, for the sake of the rights of the individual and the minority, is restricted under law, *i.e.*, where the democratic principle of popular participation in government, as a mere means, is subordinate to the liberal principle of the protection of the individual, as the end. The Federalist thus emerges as a treatise on a broadened concept of federalism, as a classic on free government in peace and security."

The following is from the table of contents: Introduction, Chapter One: The Federalist—A General Appreciation, 3. Book One: Historical Setting. Chapter Two: The American Revolution and Union, 41. Chapter Three: The Federalist—An Outgrowth of the American Revolution, 70. Book Two: Analysis. Part One: The Federalist as a Treatise on Free Government. Chapter Four: Jay on Free Government, 105. Chapter Five: Madison on Free Government, 112. Chapter Six: Hamilton on Free Government, 141. Part Two: The Federalist as a Treatise on Peace and Security. Chapter Seven: The Federalist on Peace, 177. Chapter Eight: The Federalist on Security, 219. Part Three: Final Remarks. Chapter Nine: Analysis of the Federalist—Conclusions, 255. Book Three: Theoretical Setting. Chapter Ten: The Federalist—Its Roots and Contributions, 289. Conclusion. Chapter Eleven: The Federalist—Values and Prospects, 335. Bibliography, 355. Outline of Contents, 359. Index, 369.

The bibliography lists works and studies by eighty-five authors from practically every language group in the Western Hemisphere and Western Europe over the past 172 years. This book is worthwhile reading and a definite contribution to an understanding and appreciation of *The Federalist*.

In conclusion one would like to remind all readers that Hamilton said, almost on every other page, that their program (peace, liberty and commerce) would not succeed without high intelligence in the whole citizenship.

SAM R. FISHER
Houston, Texas

1. Flesch, THE BOOK OF UNUSUAL QUOTATIONS (1959).

ORDINARY AND NECESSARY EXPENSES. *By William K. Carson and Herbert Weiner. New York: The Ronald Press Company. 1959. $10.00. Pages vi, 250.*

This book, dealing with the principles applicable to a particularly amorphous class of federal income tax deductions, is written by two partners of the accounting firm of Touche, Ross, Bailey and Smart, and is one of a series called the "Tax Practitioners' Library", edited by Robert S. Holzman. The purpose of this book is to present a "practical approach" to the solution of tax problems in this field for the use of corporate executives, investors, professional taxmen and others. In fact, the book is an admirable tool for the analysis of expenditures which may qualify as ordinary and necessary business or non-business expenses. The authors suggest a negative approach to the problem, that is, an expenditure should be classified as an ordinary and necessary expense deduction when incurred in business or in connection with the earning of income or the management of property, unless it is a personal expense or is capital in nature or violates public policy or is not allowable because of specific statutory provisions designed to prevent unintended benefits or is required to be treated in another deductible category. Full recognition is given to the doctrine that the substance must control the form of the transaction. The authors consider the requirement of reasonableness simply a standard to be used in ascertaining the substance of a transaction.

The first chapter is especially useful in setting forth intelligible guides for classification. The initial distinction to be made between deductible expenditures and personal expenditures is difficult to state in non-tax terms. The distinction between ordinary and capital expenditures is founded upon accounting concepts; however, the differences that exist between accounting and tax results can be ascribed to the fact that conservative accounting requires charges to be made against current income unless future benefits can be demonstrated, whereas the tax law casts the burden of showing the absence of future benefits upon the taxpayer. The distinction between a deductible and non-deductible expenditure based upon public policy depends, of course, on a court's response to statutory prohibitions and penalties in non-tax fields. The second chapter applies the analytical approach to twenty-two common categories of ordinary and necessary expenses and sets forth the results reached in specific instances. Chapter 3 selects and digests leading cases which are helpful in surveying the rules laid down by the courts. Chapter 4 suggests steps to be taken to ensure a deduction for these types of expenditures.

The book does not purport to be a treatise on the subject, but it does serve its announced purpose. Its special value lies in its balanced approach to the subject; it will enable the reader to escape from the underbrush and view the subject as a whole.

HARRY K. MANSFIELD

Boston, Massachusetts

POLITICAL THOUGHT: MEN AND IDEAS. *(A Unified View of a Three Thousand Year Intellectual Journey) By John A. Abbo. Westminster, Maryland: The Newman Press. 1960. $5.75. Pages xv, 452.*

Political Thought: Men and Ideas, by Professor John A. Abbo of The Catholic University of America, is a splendid one-volume history of political theories. It is arranged in chronological order beginning with ancient Greece and Rome, and brings the subject down to the present day, covering even such topics as the philosophy of Karl Marx and Lenin, the Fabians, and the Italian Fascists. This work should be of interest to the legal profession, not only because political philosophy impinges on jurisprudence, but also because the author includes several jurists in his study. Among them are Cicero, Bellarmine, Suarez, Hugo Grotius, Montesquieu and Bentham. So, too, the chapters on Aristotle, St. Thomas Aquinas, Hobbes and others, contain discussions of a number of topics that are generally included in jurisprudence.

The author has the gift of summarizing the teachings of each philosopher in a clear and succinct manner. Thus, this treatise actually contains much more material in a compact form than one would expect in a volume of this size. The author's style is very lucid and easy to comprehend. The various surveys are entirely impartial and objective, and are not colored by the author's views or attitude. Whenever he introduces his own comments, he invariably separates them from the résumé of the subject's views.

The book closes with two rather intriguing chapters. The first is a history of American political thought, beginning with the Colonial period. The author emphasizes the impress of natural law on American philosophy. He stresses the fact that much natural law is embodied in the Declaration of Independence. A thoughtful reading of the first few sentences of that historic document demonstrates the accuracy of this view. The author also discusses the place played by the theory of compact in the thinking of the Founding Fathers.

The last chapter, which is of particular interest at this time, deals with Catholic principles of politics. It is pointed out that Catholics, like other citizens, have full liberty to prefer one form of government to another, but that every one ought to accept the established government and to attempt none other than legal means to overturn it or change its form, and that no one has the liberty to oppose by violence either the form of government or the persons at its head. "Only an insupportable tyranny, or flagrant violation of the most obvious essential rights of citizens can give, after every other means of redress has failed, the right to revolt or to passive resistance." It is pointed out that the state is subject to the same moral law and the same rule of justice as individuals. On the much discussed subject of separation of church and state, the author emphatically favors the disassociation and states that the church is respectful of the liberty of conscience.

This book would be helpful and informative reading for every thoughtful lawyer interested in the theoretical side of his profession.

ALEXANDER HOLTZOFF

United States District Court
Washington, D. C.

Review of Recent Supreme Court Decisions

George Rossman

EDITOR-in-CHARGE

Civil Rights Commission . . . *confrontation of witnesses*

Hannah v. *Larche, Hannah* v. *Slawson*, 363 U. S. 420, 4 L. ed. 2d 1307, 80 S. Ct. 1502, 28 Law Week 4514. (Nos. 549 and 550, decided June 20, 1960.) *No. 549 on appeal from the United States District Court for the Western District of Louisiana. Reversed and remanded. No. 550 on petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Certiorari granted and judgment below reversed and remanded.*

Over the vigorous dissent of two Justices, the Supreme Court in this decision upheld the rules of the Civil Rights Commission which provide that the identity of persons submitting complaints to the Commission need not be disclosed and that witnesses summoned to testify before the Commission may not cross-examine other witnesses called by the Commission. The appellees in No. 549 were registrars of voters in Louisiana; the respondents in No. 550 were private citizens of Louisiana called to testify before the Commission. Both groups contended that the Commission's refusal to allow them to confront witnesses who had made charges against them deprived them of due process of law. The court below had issued an injunction prohibiting the Commission from holding any hearings involving the appellees on the ground that Congress had not authorized the Commission to adopt rules that would deprive investigated parties of their rights of confrontation and cross examination.

Speaking through the Chief Justice, the Supreme Court first considered the question of congressional authorization of the Commission's rules. The Court pointed out that Section 102 of the Civil Rights Act of 1957 avoids any reference to a witness's right to apprisal, confrontation and cross-examination of other witnesses although it spells out the right of a witness to be accompained by counsel and provides that potentially defamatory, degrading or incriminating testimony shall be received in executive session and that any person defamed, degraded or incriminated shall have the opportunity to appear as a witness and to request the Commission to subpoena other witnesses. The enumeration of certain rights and the omission of others created a presumption, the Court said, "that Congress did not intend witnesses appearing before the Commission to have the rights claimed by respondents". In fact, a proposal in Congress to include the latter rights had failed of passage, the Court noted.

Turning to the constitutional question, the Court upheld the validity of the statute by distinguishing between purely investigatory bodies, like the Commission, and adjudicatory bodies which make binding determinations that directly affect the legal rights of individuals. The Civil Rights Commission, as the Court viewed it, was purely an investigative and fact-finding body. "It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability . . . [It] does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative or executive action", the Court said. To require the Commission to conduct its hearings like a trial would hamper its investigations, the Court added.

Mr. Justice Harlan, joined by Mr. Justice Clark, noted that he joined in the Court's opinion and that in his view, "the principles established by *In re Groban*, 352 U. S. 330, and *Anonymous* v. *Baker*, 360 U. S. 287, are dispositive of the issues herein. . ."

Mr. Justice Frankfurter wrote a concurring opinion which examined the Commission's procedures for safeguarding the rights of witnesses and pronounced them adequate.

Mr. Justice Douglas, joined by Mr. Justice Black, wrote a dissenting opinion which rejected the Court's distinction between "investigative" and "adjudicatory" hearings and argued that the Commission's procedure was a "shortcut" to bring men to trial in ways not envisaged by the Constitution, since the attendant publicity of many investigations may prejudice public opinion against an accused so that a fair trial is impossible. The dissent also argued that when the Commission "summons a person, accused under affidavit of having violated the federal election law, to see if the charge is true, it either acts in lieu of a grand jury or of a committing magistrate". The sifting of criminal charges against people is for the grand jury or magistrates and for them alone, the dissent declared.

The case was argued by Deputy Attorney General Walsh for the appellants in No. 549 and the petitioners in No. 550, by Jack P. F. Gremillion for appellees in No. 549, and by W. M. Shaw for respondents in No. 550.

Eminent domain . . . *liens*

Armstrong v. *United States*, 364 U. S. 40, 4 L. ed. 2d 1554, 80 S. Ct. 1563, 28 Law Week 4626. (No. 270, decided June 27, 1960.) *On writ of certiorari to the United States Court of Claims. Reversed and remanded.*

Here the petitioners asserted materialmen's liens under state law for materials furnished to a prime contractor building ships for the United States.

The Government entered into a contract for the construction of eleven Navy personnel boats. The contract provided that in the event of default

Reviews in this issue by Rowland Young.

by the builder, the Government could terminate the contract and require the transfer of title and delivery to it of all completed and uncompleted work, together with all the manufacturing materials acquired for building the boats. When the builder defaulted, the Government exercised this option as to ten of the boat hulls still under construction and removed them from the state. The builder executed an itemized "Instrument of Transfer of Title" for the hulls and the materials then on hand. When the transfer occurred, petitioners had not been paid for their materials and they filed this suit in the Court of Claims, asserting liens under Maine law which the United States had destroyed by making unenforceable. It was contended that this constituted a taking of property without just compensation in violation of the Fifth Amendment. The Court of Claims held that the petitioners never acquired valid liens and that therefore there had been no taking of any property owned by them.

Mr. Justice Black, speaking for the Supreme Court, reversed and remanded. The Court rejected the Court of Claims' theory that, since the contract contemplated that title to the vessels would eventually vest in the Government, the Government had "inchoate title" to the materials supplied by the petitioners, rendering such materials "public works", immune from the outset to petitioners' liens. A mere prospect that property will later be owned by the United States does not render the property immune from otherwise valid liens, the Court said, and the sovereign's immunity from materialmen's liens has never been extended beyond property actually owned by the Government. Hence, the Court concluded, the Court of Claims erred in holding that no liens had attached, and the petitioners had a compensable property interest in the materials, at least to the extent of the value of the property over and above the Government's claim to the amount of its progress payments. When the Government exercised its option, the Court went on, the petitioners no longer had this compensable property because the Government, for its own advantage, had destroyed the value of the liens, and this contained every possible element of a Fifth Amendment "taking".

Mr. Justice Stewart noted that he concurred in the result.

Mr. Justice Harlan, joined by Mr. Justice Frankfurter and Mr. Justice Clark, wrote a dissenting opinion which took the position that, while petitioners had valid liens on the uncompleted work and materials, the Government's exercise of its option was not a "taking" of their interests within the constitutional meaning. The Government did not exercise its power of eminent domain at all, the dissent said; it merely exercised its power to contract and to acquire title to property. The effect, which was to render the liens unenforceable, was the result of the separate doctrine of sovereign immunity.

The case was argued by Burton R. Thorman for petitioners and by Samuel D. Slade for the United States.

Federal Power Commission . . . *limited certificate*

Sunray Mid-Continent Oil Company v. *Federal Power Commission*, 364 U. S. 137, 4 L. ed. 2d 1623, 80 S. Ct. 1392, 28 Law Week 4584. (No. 335, decided June 27, 1960.) *On writ of certiorari to the United States Court of Appeals for the Tenth Circuit. Affirmed.*

This decision held that the Federal Power Commission had the authority to tender a certificate of public convenience and necessity without a time limitation even though the applicant had requested a certificate limited to the duration of its contract with an interstate gas transmission company.

The petitioner was an independent producer of natural gas which had a contract with United Gas Pipeline Company for the sale of gas originating at the Ridge Field in Louisiana. The contract was for a twenty-year period. Since petitioner had no certificate, it was necessary for it to obtain one in order to carry out the contract. Accordingly, it requested a certificate that would "provide for its own expiration on the expiration of the . . . contract term so as to authorize Applicant to cease the delivery and sale of gas thereunder at time". The Federal Power Commission refused to include such a provision in the certificate and instead tendered one without a time limitation over petitioner's protests that the Commission could not authorize more than was requested. Nevertheless, the petitioner accepted the certificate proferred and commenced deliveries of gas under it, reserving its rights to object to the certificate's unlimited nature. The Court of Appeals rejected petitioner's objections and affirmed the Commission's order.

The Supreme Court affirmed, speaking through Mr. Justice Brennan. The Court said that to permit the petitioner to have the time limit in its certificate would mean that at the end of the period it could cease to supply gas without further leave of the Commission, which would violate the policy of the Natural Gas Act forbidding abandonment "without the permission and approval of the Commission . . ." Thus the transmission company would be forced to find a supplier of gas elsewhere and make connection with him —and the consumer would ultimately have to pay the bill. Furthermore, the time limit would enable the petitioner to file rates for "new service" at the expiration of the period, placing upon the Commission the burden of proving that the rates were unreasonable, the Court declared. In effect, this would mean that the petitioner could avoid the provisions of the statute for obtaining an increase in the rates, where the burden is upon the company to show the fairness of the increase.

The Court was unimpressed by petitioner's argument that the language of the statute supported its position. The statute provides that a certificate shall be issued "to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application". Petitioner argued that this negated the Commission's authority to go beyond the time limitations inserted in the application, but the Court said that the words "the whole or any part" obviously were meant merely to give the Commission power to grant less rather than the whole of an application. This view was borne out by the Commission's long-standing practice, the Court said.

Mr. Justice Harlan wrote an opinion dissenting in this and in No. 321, *infra*. He was joined by Mr. Justice Frankfurter, Mr. Justice Whittaker and Mr. Justice Stewart.

The case was argued by Melvin Richter for petitioner and by Howard E. Wahrenbrock for respondent.

Federal Power Commission . . . *limited certificate*

Sun Oil Company v. *Federal Power Commission*, 364 U. S. 170, 4 L. ed. 2d 1639, 80 S. Ct. 1388, 28 Law Week 4590. (No. 321, decided June 27, 1960.) *On writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Affirmed.*

This case presented issues similar to those in No. 335.

The petitioner was an independent producer of natural gas making sales to companies for transmission in interstate commerce. In 1947, it entered into a ten-year contract with Southern Natural Gas Company, a transmission company, for sale of natural gas in the Gwinville Gas Field in Mississippi. In 1954, the Supreme Court handed down its decision in *Phillips Petroleum Company* v. *Wisconsin*, 347 U. S. 672, which held that producers of natural gas were subject to regulation under the Natural Gas Act. Petitioner then applied for a certificate of public convenience and necessity. The certificate was issued in 1956 "authorizing the sale of natural gas in the circumstances . . . described" in petitioner's application. The described circumstances simply referred to petitioner's contract with Southern Natural.

In 1957, the contract between petitioner and Southern Natural expired and they entered into a new twenty-year contract, calling for an initial 150 per cent increase in price. Petitioner, taking the view that the old certificate was limited in term to the duration of the old contract, filed an application for a new certificate, using the new contract as an initial rate schedule. The Commission rejected the certificate as duplicative of petitioner's existing certificate and rejected the rate-schedule on the ground that the purported initial schedule was actually a change in the existing schedule. The Commission ordered the effectiveness of the new rates suspended and the order was upheld by the Court of Appeals.

Mr. Justice Brennan spoke for the Supreme Court when it affirmed the judgment below. The Court said that the decision in No. 335 disposed of petitioner's argument that the Commission could not grant a certificate for a longer duration than the term sought in its application. Another contention, that the 1956 order was a term certificate, not a permanent one, was disposed of by noting that the certificate made no reference to time and the fact that the batch of certificates containing petitioner's was issued at a time when the Commission itself was asserting that it lacked the power to issue term certificates.

Mr. Justice Harlan wrote a dissenting opinion in which he was joined by Mr. Justice Frankfurter, Mr. Justice Whittaker and Mr. Justice Stewart. The dissent argued that the Court was failing to distinguish between an interstate pipeline and an independent producer of natural gas. In this view, the producer was not offering a service, consisting of the perpetual movement of natural gas in interstate commerce, but was merely selling a commodity. The Act creates two distinct bases of jurisdiction for the Commission, transportation and sale, the dissent said, and it went on to argue that since the independent producer engages solely in the latter, it is *only* the act of sale to which the Commission's jurisdiction attaches. The dissent agreed that the Commission could tender a perpetual certificate to a producer, but said that the Commission should bear the burden of showing that the public convenience and necessity required such a condition.

Mr. Justice Frankfurter wrote an opinion concurring in the dissent. This opinion stressed the point that the Commission should be required to justify its denial of a time-limited certificate.

The case was argued by Leo J. Hoffman for petitioner and by Howard E. Wahrenbrock for respondent.

Robinson-Patman Act . . . *price discrimination*

Federal Trade Commission v. *Anheuser-Busch, Inc.*, 363 U. S. 536, 4 L. ed. 2d 1385, 80 S. Ct. 1267, 28 Law Week 4547. (No. 389, decided June 20, 1960.) *On writ of certiorari to the United States Court of Appeals for the Seventh Circuit. Reversed and remanded.*

The sole question here was the narrow one whether respondent's pricing activities constituted price discrimination within the meaning of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act. The Court held that respondent had engaged in price discrimination.

The Federal Trade Commission charged that respondent had been guilty of price discrimination when it lowered the prices of its premium beer in the St. Louis market without making similar price reduction in other markets in the country. The price reduction followed a general increase in the price of beer after October 1, 1953, when most of the national breweries granted a wage increase to their workers. At that time, respondent's three principal competitors in the St. Louis area maintained their pre-October price of $2.35 per case. In January, 1954, respondent lowered its price in the St. Louis area from $2.93 to $2.68 and in June it cut the price to $2.35, the same price charged by its competitors. It made no similar price cuts in any other area. In March, 1955, respondent increased its St. Louis prices 45 cents per case and its competitors raised theirs 15 cents per case, thus restoring a substantial differential. The Commission concluded that respondent had discriminated in price as between purchasers differently located, and it rejected respondent's contention that the price reductions were made in good faith to meet the equally low prices of competitors. The Court of Appeals resting its holding entirely on the ground that the statutory element of price discrimination had not been established and set aside the Commission's cease and desist order.

The Supreme Court reversed and remanded, speaking through the Chief Justice. The Court stressed the point

that its decision was limited to the narrow question of whether respondent's activities came under the statutory definition of price discrimination —whether there was a competitive injury, whether the good faith defense was valid, whether the Commission's order was unduly broad were questions left for answer in further proceedings before the Court of Appeals.

In reaching its decision, the Court said that there was a violation of Section 2 when there was a price discrimination that dealt "the requisite injury" to primary-line (sellers') competition. The Court rejected the lower court's reasoning that, before there can be price discrimination within the statutory meaning, there must be some relationship between the different purchasers that entitled them to comparable treatment. The existence of competition among buyers that are charged different prices by a seller is important in terms of adverse effect on secondary-line competition, said the Court, but it is irrelevant so far as injury to primary-line competition is concerned. Price discrimination within the meaning of Section 2(a), the Court held, is merely a price difference.

The case was argued by Philip Elman for petitioner and by Edgar Barton for respondent.

Taxation
depletion allowance

United States v. *Cannelton Sewer Pipe Company*, 364 U. S. 76, 4 L. ed. 2d 1581, 80 S. Ct. 1581, 28 Law Week 4602. (No. 513, decided June 27, 1960.) *On writ of certiorari to the United States Court of Appeals for the Seventh Circuit. Reversed and remanded.*

The issue here was the proper basis for the statutory depreciation allowance to which respondent, an integrated miner-manufacturer of burnt clay products from fire clay and shale, was entitled. The Court ruled that the depreciation allowance was to be computed on the value of respondent's raw fire clay and shale, after the application of the ordinary treatment processes normally applied by nonintegrated miners.

In the tax year ending November 30, 1951, respondent owned and operated a mine that produced fire clay and shale. It transported the raw material by truck to a plant about a mile and a half from the mine where it fabricated the material into vitrified sewer pipe, flue lining and related products. The 1939 Internal Revenue Code allowed a percentage depletion on "gross income from mining" and defined mining to include "ordinary treatment processes normally applied by mine owners . . . to obtain commercially marketable mineral product or products". The District Court accepted respondent's argument that its first "commercially marketable product" was sewer pipe and other vitrified articles. The Court of Appeals affirmed, saying that respondent could not profitably sell its raw fire clay and shale without processing it into finished products. On this basis, respondent was entitled to a depletion allowance of about $4.00 per ton. The Government contended that the depletion should be based on the value of the raw fire clay and shale, in which case the allowance would be about twenty cents a ton.

Mr. Justice Clark reversed and remanded for the Court. The Court pointed out that the statute defines "ordinary treatment processes" by setting out four specific categories: (1) those processes dealing with the mining of coal; (2) processes dealing with the mining of sulphur; (3) processes as to minerals customarily sold in the form of the crude mineral product; (4) processes as to minerals not sold in the form of the crude mineral product. The Court agreed with the Government that fire clay and shale, although not specifically enumerated in the statute, fell within the third classification and accordingly that the depletion properly was computed on the value of the raw mineral product. The Court pointed out that three fifths of the fire clay produced in Indiana in 1951 was sold in its raw state. "This indicates", the Court declared, "that fire clay and shale were 'commercially marketable' in their raw state unless that phrase also implies marketability at a profit. We believe it does not." Whether respondent could sell the raw material at a profit was immaterial, the Court reasoned, because the substantial tonnage sold in that state showed that the products were "ready for industrial use or consumption—in short, they have passed the 'mining' state on which the depletion principles operate".

The respondent had argued that the processes it used were the ordinary ones applied in the industry. To this the Court replied that this was true of miner-manufacturers, but not true of the nonintegrated miners, and it was the latter to whom Congress had granted the depletion allowance.

Mr. Justice Harlan wrote an opinion concurring in the result. This opinion stressed the importance of the Treasury Regulations in clarifying the meaning of the statute.

The case was argued by Ralph S. Spritzer for the United States and by Erwin N. Griswold for respondent.

Taxation . . .
depreciation

Massey Motors, Inc. v. *United States, Commissioner of Internal Revenue* v. *Evans*, 364 U. S. 92, 4 L. ed. 2d 1592, 80 S. Ct. 1411, 28 Law Week 4607. (Nos. 141 and 143, decided June 27, 1961.) *No. 141 on writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Affirmed. No. 143 on writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Reversed.*

At issue here was the proper accounting method for depreciating the value of automobiles owned by automobile rental agencies and dealers. The Court upheld the Commissioner's method by which depreciation was allowed only for the period in which the taxpayer actually used the vehicle, the base being the cost of the property to the taxpayer less its resale value at the time it was disposed of. The cases involved Section 23(1) of the 1939 Internal Revenue Code, which permits a deduction for "wear and tear . . . of property used in trade or business".

In No. 143, the taxpayer was engaged in the business of leasing new automobiles, which he purchased at factory price and resold at current used car prices after fifteen months or so of use. Customer demand for the latest models made it less profitable for him to keep the cars for a longer period. The taxpayer claimed depreciation

based on an estimated useful life of four years for the vehicles with no salvage value. In 1950, for example, his return showed each car's cost to be around $1,650; after fifteen months' use, he sold it for around $1,380. Depreciation, based on a four-year period, was calculated at $515 per vehicle, leaving him a net gain of $245, on which he calculated a capital gains tax. The Commissioner denied the depreciation on the theory that the useful life was not the total economic life of the automobile, but only the period it was actually used by the taxpayer in his business, and that the salvage value was not junk value but the resale value at the time the taxpayer sold the vehicle. On this basis, the Commissioner estimated the useful life of each vehicle at seventeen months and the salvage value of each at $1,325. Depreciation was permitted only on the difference between this value and the original cost. The Tax Court accepted the Commissioner's view, but the Court of Appeals reversed.

In No. 141, involving depreciation for automobiles used by the officers and employees of a franchised Chrysler dealer, the Court of Appeals held for the Commissioner.

Mr. Justice Clark, speaking for the Supreme Court, examined the applicable Treasury Regulation—No. 111—which defines the depreciation allowance as "that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan . . . whereby the aggregate of the amounts so set aside, plus the salvage value, will, at the end of the useful life of the depreciable property, equal the cost or other basis of the property". The Court agreed that the term "useful life" was not free from ambiguity, and it said that the Commissioner had perhaps acquiesced in inconsistent holdings on the point. However, the Court went on, the Commissioner has made it clear from the promulgation of his first regulation on the point in 1919 that salvage has some value and that it is to be considered as something more than zero in calculating depreciation. Many of the cases cited by the parties involved controversies over the actual value of salvage, not as scrap but on resale, the Court noted. Furthermore, Congress intended by the depreciation allowance not to make the taxpayers a profit, but merely to protect them from loss, it was said.

The Court added that the Commissioner's method "computes depreciation expense in a manner which is far more likely to reflect correctly the actual cost over the years in which the asset is employed in the business".

The cases were argued by Howard A. Heffron for the United States in No. 141 and for petitioner in No. 143, by William R. Frazier for petitioner in No. 141, and by Edgar Bernhard for respondents in No. 143.

Taxation . . . *depreciation*

The Hertz Corporation v. *United States*, 364 U. S. 122, 4 L. ed. 2d 1603, 80 S. Ct. 1420, 28 Law Week 4611. (No. 283, decided June 27, 1960.) *On writ of certiorari to the United States Court of Appeals for the Third Circuit. Affirmed.*

This was a companion case to Nos. 141 and 143. The taxpayer decided to use the accelerated method of depreciation provided for in Section 167(b)(2) of the 1954 Internal Revenue Code—the so-called "declining balance method", which can be used only for property "with a useful life of 3 years or more". The Commissioner, applying his definition of "useful life", denied the right to use the declining method balance as to the taxpayer's automobiles, since they had a useful life under his theory of less than three years. The Commissioner ruled that trucks, which concededly had a useful life of more than three years, could be depreciated under the declining balance method, but he held that the salvage value of the trucks must be accounted for in the depreciation equation. The Court of Appeals upheld both these rulings.

The Supreme Court affirmed, again speaking through Mr. Justice Clark. The Court disposed of the controversy over the availability of the declining balance method of depreciation for the taxpayer's automobiles by pointing out that its disposition of Nos. 141 and 143 disposed of the taxpayer's contention about the meaning of "useful life".

The Treasury Regulation upon which the Commissioner relied to sustain his ruling that the salvage value of the trucks must be accounted for in making the depreciation was promulgated in 1956. Since the years involved were 1954-1956, the taxpayer argued that the regulation was being applied retroactively. The Court brushed this contention aside, saying that the petitioner had chosen his own weapon and could not be allowed to abandon it. It pointed out that the regulation says that "in no event shall an asset . . . be depreciated below a reasonable salvage value", and said that there was nothing in the declining balance system that required an assumption that depreciation should be allowed beyond what reasonably appears to be the price that will be received when the asset is retired, and therefore the interpretation sought by the taxpayer would not meet the statutory requirement that the depreciation allowance be *reasonable*.

Mr. Justice Harlan, joined by Mr. Justice Whittaker and Mr. Justice Stewart, wrote an opinion dissenting in Nos. 141 and 143 and concurring in the judgment in No. 283. This opinion took the view that the Commissioner's theory of "useful life" in Nos. 141 and 143 was wholly inconsistent with his previous position maintained for more than thirty years, and that he should not now be permitted to defeat his own position as regards the meaning of "useful life".

Mr. Justice Douglas noted that he joined the opinion insofar as Nos. 141 and 143 were concerned, but that he would have reversed in No. 283 on the ground that the change in administrative practice involved should not be retroactively applied.

The case was argued by Edgar Bernhard for petitioner and by Howard A. Heffron for the United States.

What's New in the Law

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George Rossman . EDITOR-IN-CHARGE

Richard B. Allen . ASSISTANT

Admission to Bar . . . *good moral character*

The Supreme Court of Washington, with two judges dissenting, has refused permission to take the bar examination to a man who was convicted of failing to report to a conscientious objector work camp during World War II. Affirming the Board of Governors of the Washington State Bar Association, the Court concluded that the applicant did not have good moral character, one of the prerequisites to the bar examination, because his acts leading to his conviction "were unjustifiably defiant of the laws of the United States".

The applicant was graduated from Columbia University Law School in 1933 and was admitted to the New York Bar in 1934. When the Selective Service and Training Act of 1940 became effective, he registered and was classified as a conscientious objector. Later he was ordered to report to a work camp, as provided by the Act, but he refused to report and was convicted. He served twenty-two months of a three-year sentence. The applicant, now 50 years old, contended that because of his age it was not likely that the occasion would ever arise again for him to refuse to report to a war-time camp for conscientious objectors.

But the Court said "We are not inclined to adopt a transitory theory as to the applicant's character... Personal example is neither the only nor most effective way of exemplifying his felonious principles. An old lawyer can impede his country's war effort in many ways as well as a young one." The applicant's character, as shown by the conviction, was necessarily in question when he sought admission to the Bar, the Court declared, and continued:

> ...A loyal and discerning citizen is aware of his great heritage of liberty and acknowledges his duty to do his share in preserving it. Without a sense of duty, the applicant does not measure up to the standard of citizenship rightly expected of an attorney at law.

One judge concurred specially, saying that he did not want to be understood as supporting a position that a conscientious objector *per se* is morally unfit to practice law. He emphasized that he reached his conclusion on the basis of the applicant's belief that the government could not compel him to do an act he personally believed to be morally wrong. He said that this trait of character, when coupled with a lawyer's acknowledged duties as an officer of the court, disqualified him from the profession.

The dissenting judge, joined by one other, took the position that the applicant's conviction, which resulted from a firmly held principle, and his subsequent imprisonment did not indicate a lack of moral character. He drew an analogy with the American colonists who refused to pay taxes levied without their representation, and asked: "Did a breach of duty to obey the law and imprisonment therefor establish a lack of moral character, or did it establish that they were men of deep and strong convictions?"

(*Application of Brooks*, Supreme Court of Washington, September 29, 1960, Mallery, J., 355 P. 2d 840.)

Editor's Note: Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.

Antitrust Law . . . *television operations*

A former Milwaukee television station owner has failed to convince the Court of Appeals for the District of Columbia Circuit that he has grounds for an antitrust suit against the Columbia Broadcasting System and others based on the manner in which C.B.S. acquired a Milwaukee station in 1955.

The plaintiff was the sole owner of a Milwaukee ultra-high frequency (UHF) station which had an affiliation with the C.B.S. television network subject to unilateral cancellation by C.B.S. on six months' notice. There were two very-high frequency (VHF) and another UHF station in Milwaukee; one of the VHF stations had an affiliation with the National Broadcasting Company.

In 1954, after having been told by a broker that a purchaser (not C.B.S.) would pay $2,000,000 for his station after the Federal Communications Commission changed its rules on multiple ownership, the plaintiff commenced to make substantial improvements to his facilities. C.B.S. considered the $2,000,000 "completely out of line", and proceeded through a third party, who obtained an option without revealing his principal, to purchase the other UHF station for $335,000.

When the F.C.C. changed its multiple-ownership rules, C.B.S. exercised the option to purchase the other station and cancelled its affiliation agreement with the plaintiff. Upon the latter's protests and at his insistence, C.B.S. bought his new equipment for $500,000 and turned over to him the facilities it acquired from the station it purchased. The plaintiff's station went out of business ten days after C.B.S. began using its new station. The C.B.S. station itself was closed four years later, presumably because of its inability to compete with VHF telecasting.

The plaintiff sued under Section 4

of the Clayton Act for treble damages, charging a combination and conspiracy to restrain trade and commerce in the television industry and monopolization of that trade and commerce in violation of Sections 1 and 2 of the Sherman Act. He asked for $1,450,000 damages, computed on the basis of $2,000,000 for his station, less the $500,000 received and $50,000 for the equipment he received from the other station.

With one judge dissenting, the Court affirmed the District Court's dismissal of the suit on summary judgment. The Court concluded first that the plaintiff was not forced to sell by anything C.B.S. did. It pointed out that the large valuation on the plaintiff's station depended on the C.B.S. affiliation, which was subject to six-months' cancellation, and that the sale of his station's equipment had been at his own entreaty.

The Court went on to hold that there was no conspiracy because there were no conspirators. It said that C.B.S. could not conspire with its own unincorporated television division and two of its own employees, and that the record showed that the other alleged conspirators—the other UHF television station and the third party through whom it was purchased—did not enter into any scheme with C.B.S.

It concluded that none of the acts done by C.B.S. or any of the co-defendants resulted in a restraint of trade or commerce. It pointed out that the plaintiff had intended to continue operating and that his failure was due to the superiority of the VHF competition. The Court rejected consideration of an argument that the television networks practice "vertical monopolization".

The dissenting judge thought that the plaintiff should have been permitted to go to trial on his allegations.

(*Poller* v. *Columbia Broadcasting System, Inc.*, United States Court of Appeals, District of Columbia Circuit, November 10, 1960, Miller, C.J.)

Civil Procedure . . . *discovery procedures*

A defendant automobile manufacturer's report on its examination of an allegedly defective tie rod is not available for examination by the opposing party, the Florida District Court of Appeals for the Third District has held.

The question arose in a personal-injury action against the manufacturer based on the alleged failure of the steering mechanism, and particularly a defective tie rod. During the course of a pretrial deposition the plaintiff said he still had the tie rod and that he intended to produce it at the trial. On motion of the defendant, the trial court required the plaintiff to produce the tie rod for "examination and chemical analysis". The plaintiff complied; the manufacturer had the tie rod for thirty days and then returned it. Thereafter the plaintiff sought an order requiring the defendant to furnish him a copy of the report of examination, but the defendant refused on the ground that the report was part of its preparation for trial and the "work product" of its counsel.

The Court agreed. It declared that discovery under the Florida rules would not extend to the "work product" of the adverse party, whether the product was the "creature of the party, his agent or his attorney". It went on to hold that the report in this case was a "work product", no matter by whom made, but it indicated that a different result might be reached if the report had been prepared by an expert designated by the trial court.

The Court found no exception under which it might order production of the report. "It has not been shown to us", it said, "how the withholding of the information sought would defeat the interests of justice, nor has it been shown that the same information sought is not as readily available to the [plaintiff] as it was to the [defendant]."

(*Ford Motor Company* v. *Havee*, Florida District Court of Appeals, Third District, October 6, 1960, Pearson, J., 123 So. 2d 572.)

Communications Law . . . *equal time*

The United States District Court for the District of Massachusetts has held that it has no jurisdiction to entertain the complaint of a political candidate that it has no jurisdiction to entertain required by the Communications Act, in the absence of a prior determination of the case by the Federal Communications Commission.

In a complaint filed on November 2, 1960, the plaintiff, David Franklin, a "sticker" (write-in) candidate for Congress from Massachusetts, alleged that WGBH-TV, a Boston television station, had denied him "equal time" because his Republican and Democratic opponents had appeared on the station whereas his request for equal time had been refused by the station. He alleged that the station had refused his request on the ground that the program on which the other candidates had appeared was a "bona fide news interview" within the meaning of the 1959 amendment to Section 315 of the Communications Act, and hence that the equal-time requirement did not apply. He contended, however, that the program was not a "bona fide news interview" and he sought a preliminary injunction requiring the station to permit him to appear.

At a hearing the day before election, the station argued that the Court lacked jurisdiction to determine the substantive issue since the plaintiff had not presented his complaint to the Commission prior to instituting the suit, that the plaintiff had had an adequate administrative remedy before the Commission which he had failed to pursue and that the enforcement and review provisions of the Communications Act revealed the intention of Congress that federal courts should not intervene at the petition of a private party prior to an F.C.C. determination in the case.

The Court dismissed the complaint, holding that it lacked jurisdiction to determine the merits of the plaintiff's claim "in that primary jurisdiction thereof is vested in the Federal Communications Commission and the plaintiff has not exhausted his remedies before the same".

(*Franklin* v. *Broadcast Station WGBH-TV*, Civil No. 60-820-F, United States District Court, District of Massachusetts, November 7, 1960, Ford, J.)

Federal Income Tax . . . *legislative expense*

An Arkansas newspaper editor and publisher who spent $6,000 on a campaign he thought would keep business in his home town and help his newspaper has been told by the Court of

Appeals for the Eighth Circuit that he can't deduct the amount as business expenses.

The 1955 Arkansas Legislature passed an act exempting livestock and poultry feeds from the state sales tax. The taxpayer thought that the exemption would lead to a higher sales tax and that this would drive business from his city to a neighboring Texas city, where there was no sales tax, and that his paper's advertising revenues would suffer. To avoid this he spent $6,024.96 getting the number of signatures required by law to refer the exemption act to a general referendum. He claimed that he could deduct these expenses either as ordinary and necessary business expenses under Section 162(a) of the 1954 Internal Revenue Code, or as ordinary and necessary non-business expenses under Section 212(1) or (2).

The Tax Court had found that the expenditures were made for the promotion or defeat of legislation and therefore were not deductible under Treasury Regulations that prohibit deductions for "sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses . . ." It also concluded that any benefits that might have resulted personally to the taxpayer were too remote to support his claimed deduction.

Affirming the Tax Court, the Eighth Circuit noted that the regulations had been upheld in *Textile Mills Corporation* v. *Commissioner*, 314 U. S. 326, and had been applied with vigor by the United States Supreme Court last year in *Cammarano* v. *U. S.*, 358 U. S. 498, in which they were used to deny deduction for expenditures for a publicity campaign to defeat an initiative measure which would have put the taxpayers out of business.

The Eighth Circuit declared that on the groundwork of that case it must conclude that the actions of the taxpayer here—collecting signatures to place an issue on the ballot for referendum—were the "promotion or defeat of legislation". Holding a referendum a legislative measure, the Court said: "The taxpayer here argues that he expended these funds only for the purpose of securing signatures to make possible the referendum, and not for the promotion or defeat of legislation. But obviously he was doing it for the purpose of annulling the existing legislation."

The Court also ruled that the taxpayer had failed to show that the expenditures were necessary and ordinary in carrying on his business as editor, publisher and stockholder of the newspaper.

(*Washburn* v. *Commissioner*, United States Court of Appeals, Eighth Circuit, November 15, 1960, Woodrough, J.)

Labor Law . . .
use of union's funds

The Court of Appeals for the Third Circuit has approved a preliminary injunction barring the officers of a Teamsters' local from using any of the local's funds for legal fees to defend pending civil or criminal actions arising from the alleged misuse of the local's funds.

The action was brought by nine members of the local under provisions of the Labor-Management Reporting and Disclosure Act of 1959, which makes it the duty of a union's officers "to hold its . . . money and property solely for the benefit of the organization and its members . . ." To contest the grant of a preliminary injunction, the union officers relied on a resolution of the local purportedly authorizing the payment of the legal fees. The district judge ruled this action invalid as beyond the powers of the union's own constitution and inconsistent with the aims and purposes of the Act. The Eighth Circuit agreed with this.

The Court also quoted with approval the statement of the district judge that his ruling did not pass on the right of the local to reimburse its officers for their legal expenses "in the event they are exonerated from any wrongdoing in connection with the handling of union funds involved in the actions presently pending".

(*Highway Truck Drivers and Helpers, Local 107* v. *Cohen*, United States Court of Appeals, Third Circuit, October 21, 1960, *per curiam*.)

Leases . . .
corporate changes

An Illinois court has refused to invalidate a lease provision under which a corporate tenant's possession was terminated because the ownership of the corporation changed hands.

The corporation was the lessee of retail space in a shopping center. In addition to an ordinary provision by which the tenant agreed not to sell, assign or transfer the lease or sublet the premises without the written consent of the landlord, the lease contained an article giving the landlord the right to terminate on sixty days' notice "if at any time during the term of this lease, any part or all of the corporate shares [of the tenant] shall be transferred by sale, assignment, bequest, inheritance, operation of law or other disposition so as to result in a change in the present control of said corporation by the person or persons now owning a majority of said corporate shares".

After learning that all the capital stock of the lessee corporation had been sold to another corporation, the landlord served the required notice and claimed possession. Although admitting the stock sale, the lessee contended that there had been no change in its "control . . . or in the policy and operation" and it commenced a declaratory judgment and injunctive relief suit to preserve the lease.

Holding with the landlord, the Appellate Court of Illinois for the First District rejected the lessee's contention that the lease provision was a restraint on alienation and as such contrary to the state's public policy. The Court noted that the case appeared to be one of first impression, but it reached its conclusion by drawing an analogous extension from the lessor's powers to enforce provisions prohibiting subleasing and transfer.

The Court termed the provision a condition subsequent, rather than a forfeiture. It declared that a forfeiture is brought about by the violation of a covenant or conditional limitation in the lease, and it concluded that the provision in question here raised a condition upon the occurrence of which the lessor had the right to, but did not need to, act.

In comparing the provision to those prohibiting an assignment of a lease, the Court said: "When a corporation transfers all its stock the control of the corporation is also transferred... Such a transfer would be to all intents and purposes a substitution of a lessee, although, by fiction of law, in name the corporate lessee remained the same." The Court continued by remarking that a lessor might protect itself by a subletting provision if the lessee were a natural person, but that only an additional provision would be adequate protection against a corporate lessee.

(*Associated Cotton Shops, Inc.* v. *Evergreen Park Shopping Plaza of Delaware, Inc.*, Appellate Court of Illinois, First District, October 19, 1960, McCormick, J., 170 N.E. 2d 35.)

Libel . . .
official's privilege

A former district director of internal revenue has failed in a malicious defamation action against a special assistant attorney general who had been appointed to prosecute him. The Court of Appeals for the Sevent Circuit has held that the allegedly libelous press-conference remarks were clothed with an absolute privilege.

The plaintiff was under indictment with four others charging conspiracy to defraud the United States of income taxes and other offenses growing from criminal tax evasion cases. The defendant had been appointed a special assistant to the Attorney General of the United States to prosecute the case and to be "in charge of the investigation of alleged irregularities in the office of the Director of Internal Revenue, Chicago, Illinois".

At a press conference the special assistant said his job was to conduct work preparatory to the trial to seek "possible further corruption", and he went on to say:

> When you have a man who was district director indicted for conspiracy to defraud the U. S. government of money, it doesn't take a genius to see something is wrong.
>
> This is not a witch hunt, and it should be good for employee morale, because an awful cloud has been hanging over the Chicago office.

The former district director claimed this was malicious defamation, but his suit was dismissed by the District Court on summary judgment.

Relying on the Supreme Court's decision in *Barr* v. *Matteo*, 360 U. S. 564, where a press release of the acting director of the Office of Rent Stabilization was held privileged, the Seventh Circuit affirmed. It declared that the test of privilege of an official's actions is the relation of the conduct complained of to the matters committed to the official's control and supervision. "A public statement", the Court continued, "may be privileged where the nature of the official's duties requires that he be immune from private tort liability in respect to it in furtherance of the effective functioning of government. Privilege, therefore, is directly dependent upon the scope of power and discretion incident to the duty entrusted to the officer by delegation and redelegation of authority from the highest to the lower levels of the governmental hierarchy."

Applying these principles, the Court noted that the defendant had been appointed for specific special duties by the Attorney General, who had authorized the prosecution and expected him to conduct relations with the press. It added that the public had a right to be informed. In view of this, the Court concluded, the defendant should have an absolute privilege against civil tort liability. It warned, however, that this did not mean that the official would be immune to governmental or professional sanctions if he were guilty of official irresponsibility.

(*Sauber* v. *Gliedman*, United States Court of Appeals, Seventh Circuit, November 10, 1960, Grubb, J.)

Negligence . . .
malpractice by attorney

An attorney's mistaken advice about the effect of the expiration of a limitation period on his client's rights is not negligent malpractice where the very determination that the advice is wrong comes from an appellate decision in the client's case.

This is the decision of the California District Court of Appeal for the First District in a case involving a workmen's compensation claimant who sued her attorney for $31,000. The attorney represented her before the state's Industrial Accident Commission, and she received a permanent disability rating of 31 per cent. Later her condition worsened and the attorney filed a petition for further medical treatment; but he did nothing to seek a change in her permanent disability rating.

Later she retained another attorney who sought a change in her rating. The Commission denied this because of the expiration of five years from the injury. The California statute provides that no award of compensation shall be rescinded, altered or amended after five years. This decision was affirmed by the California Supreme Court, with two judges dissenting.

The attorney contended that he did not file a petition for change in rating because in his opinion it would have been futile to do so, under the state of the law as it then appeared, until the issue of the claimant's eligibility for further medical treatment had been resolved. The District Court of Appeal agreed that this was a reasonable conclusion. It declared that an attorney must use ordinary judgment, care, skill and diligence, but that he is not liable for a lack of knowledge of the true state of the law where a doubtful or debatable point is involved. It concluded that, while the defendant's advice proved to be wrong, it was the product of reasonable belief at the time it was given.

(*Sprague* v. *Morgan*, California District Court of Appeal, First District, October 20, 1960, McGoldrick, J., 8 Cal. Rptr. 347.)

Torts . . .
pre-natal injuries

The Supreme Court of Pennsylvania has joined the increasing number of jurisdictions holding that a child may after birth maintain an action for a negligent injury sustained *en ventre sa mere*. The infant plaintiff alleged that she was born Mongoloid as a result of an injury suffered when her mother was one month pregnant in an automobile accident caused by the defendant's negligence.

In reaching its conclusion the Court overruled its own 1940 decision in which, relying on 4 *Restatement of Torts* §869, it had denied a similar action. Looking at the question now,

the Court noted that of the states that have considered the question or have legislation on the subject, eighteen now allow recoveries for pre-natal injuries, while eight deny recovery.

The Court said, however, that the "real catalyst of the problem is the current state of medical knowledge on the point of the separate existence of a foetus", and it went on to declare that medical knowledge now supports the postulate that mother and child are two separate and distinct entities. Therefore, the Court reasoned, the old objection to maintenance of the action —that the tortious injury was to the mother rather than the unborn child— no longer has validity. The Court subscribed to medical authority recognizing that a child has a separate existence from the moment of conception, and it said that the question of when the foetus becomes viable, which has been discussed in several pre-natal injury cases, has "little to do with the basic right to recover".

One judge dissented. He complained that the Court was overruling a fairly recent decision without making a finding that there was any development in medical knowledge since that case to justify a chance in decisional law. He said that the former rule was supported by *stare decisis*, the *Restatement* and better reasoning. He declared that undesirable suits, such as infant against mother for negligent conduct during pregnancy, could result from the change in doctrine, and he concluded: "Negligence cases are swamping our courts; families are growing farther and farther apart—why create and greatly increase litigation and give new causes for family discord?"

(*Sinkler* v. *Kneale*, Supreme Court of Pennsylvania, September 26, 1960, Bok, J., 164 A. 2d 93.)

What's Happened Since . . .

■ On October 20, 1960, the Court of Appeals for the District of Columbia Circuit reversed and remanded the decision of the United States District Court for the District of Columbia in *Public Affairs Associates, Inc.* v. *Rickover*, 177 F. Supp. 601 (46 A.B.A.J. 89; January, 1960). The District Court had dismissed an educational publisher's declaratory judgment suit seeking a finding that Vice Admiral Hyman G. Rickover might not copyright a series of his speeches which were not produced or given in his official capacity, but some of which related to his special service capability—the use of nuclear power in naval vessels—and all of which were mechanically reproduced by the Navy. The Court of Appeals agreed that the speeches were not government publications and therefore were eligible for copyright, but it held, with one judge dissenting, that widespread dissemination to the press and others of many of the speeches contemporaneously with their delivery, and before the application for copyright, constituted a publication and put those speeches in the public domain.

■ On November 7, 1960, the Supreme Court of the United States denied certiorari in *Federal Trade Commission* v. *Dilger*, 278 F. 2d 337 (46 A.B.A.J. 672; June, 1960), leaving in effect the decision of the Court of Appeals for the Seventh Circuit that the Census Act's provisions for secrecy of data furnished under it preclude enforcement of a Federal Trade Commission subpoena for production of retained file copies of schedules a manufacturer prepared for the Census Bureau.

■ On November 29, 1960, the Supreme Court of Illinois denied a petition for leave to appeal in *Bradley* v. *Cowles Magazines, Inc.*, 26 Ill. App. 2d 331, 168 N.E. 2d 64 (46 A.B.A.J. 1225; November, 1960), leaving in effect the decision of the Appellate Court of Illinois for the First District dismissing a mother's right-of-privacy suit based on magazine articles concerning the murder of her 14-year-old son, as related to the magazine writer by the two men who were accused of the murder but later tried and acquitted.

Tax Notes

Prepared by Committee on Bulletin and Tax Notes, Section of Taxation, John M. Skilling, Jr., Chairman; John M. Bixler, Vice Chairman.

Closing the Dividend and Interest Gap

A Message from Dana Latham, Commissioner of Internal Revenue

I am glad, for two reasons, to have this opportunity to write about the Internal Revenue Service's program for closing what has been called the "dividend and interest gap". First, because this program stands as a fine example of what can be accomplished through action in concert by an agency of the Federal Government and the business community. And secondly, because it has enabled the Revenue Service to bring additional revenues into the Treasury under the existing tax laws, without imposing additional tax or accounting burdens on anyone. In short, I believe the program has demonstrated both the vigor of our voluntary self-assessment system and the willingness of our private institutions to work with their Government toward a common end.

Before describing the program itself, I should like to set forth the background on Treasury's campaign to close the dividend and interest gap. Estimates made independently by both the Internal Revenue Service and private research groups indicated that there was a substantial difference between the amount of interest and dividends reported on income tax returns and the amounts actually paid out. While much of the difference could be attributed to the $50 dividend exclusion, the fact that many recipients are not subject to tax, and similar factors, it is clear that this is not the whole story. Our estimates were that approximately $1 billion in dividends and more than $3 billion in interest remained unaccounted for. These figures represent a tax loss of at least $500 million annually. To meet this problem, a program with both educational and enforcement aspects was undertaken.

We have no doubt that much of the gap has been due primarily to misunderstanding of the law, inadequate records by recipients and pure oversight. Consequently, there was launched an extensive educational campaign designed to inform taxpayers of the taxability of such income and to see that taxpayers were supplied with specific information with regard to the amounts of dividends and interest paid to them.

The co-operation given us by payers of dividends and interest was most impressive. A co-ordinated information campaign was undertaken by the principal associations of dividend and interest payers and by tens of thousands of corporations, banks and individuals who make such payments. Our estimates indicate that more than 75 million special notices were mailed to recipients of dividends and interest. As a result, we are confident that very few dividend and interest recipients have failed to receive one or more notices.

We also made a number of changes in the tax forms and instructions in order to emphasize the requirements concerning the reporting of dividend and interest income. And at the same time we developed a good deal of filing publicity on the subject and took a number of other such steps.

To supplement this educational campaign, the Internal Revenue Service undertook a vigorous enforcement campaign designed to detect and bring to account persons who were knowingly failing to report dividend and interest income. Probably the most important of these was an expanded program for checking Forms 1099 (which, as you know, are the reports we receive from payers of dividends and interest) against the returns of individual taxpayers. The Service receives over 100 million of these 1099's each year, so it cannot at present check them all. Consequently, the 1099's received have always been checked against individual tax returns on a sampling basis.

However, in connection with our dividend and interest program, we substantially expanded this matching program in every one of our sixty-one districts throughout the nation. Follow-up audits were made in cases in which a return had not been filed or where additional taxes appeared to be due.

As a result of our routine procedures, plus these special efforts, some three hundred prosecution cases involving failure to report dividends and interest were undertaken and are now in process. In recent months, thirty-one convictions have been obtained in such cases, resulting in the imposition of fines ranging up to $20,000, and imprisonment in a number of cases.

While we cannot yet fully measure the results of our special efforts, indications are that they have been quite successful. Out of approximately 100,000 returns screened, we selected some 8,000 cases where the information returns indicated that the taxpayer may have failed to report dividend or interest income in full in a prior year (1958). Of these, approximately 2,500 were selected for actual examination in connection with this test program.

As of October 14, 1960, we have received audit reports on 1,829 of these cases involving *dividend* income. These reports show that for 1958, 41 per cent actually did report in full, and that 59 per cent (1,077) reported in part, or failed to report, dividend income.

The number of these taxpayers who failed to report dividend income or reported in part, dropped from 1,077 in 1958 to 536 in 1959 or a decrease of 50 per cent in the number of taxpayers underreporting.

In the interest income area, we have

received audit reports on 1,076 of these cases. These reports show that for 1958, 63 per cent actually did report in full, and that 37 per cent (396) reported in part, or failed to report, interest income. The number of these taxpayers who failed to report interest income, or reported in part, dropped from 396 in 1958 to 203 in 1959 or a decrease of 49 per cent in the number of taxpayers underreporting.

I think you will agree that, although they are based on a small sample, these figures do indicate that our efforts to close the dividend and interest gap are meeting with success.

In order to consolidate our gains, however, it is essential that payers of dividends and interest continue, in the months ahead, the educational campaign so well begun in 1959. If, particularly during the final quarter of 1960 and through early April, 1961, the Service receives the same excellent co-operation as it did in the 1959-1960 program, I have every reason to believe that we can reduce still further the income reporting gap in this important area.

How To Know a Truthful Postmark

A MAN OUGHT to be able to practice law without our *Journal* giving away his secrets.

This is obviously not the case.

You just can't win if you lurk in your office waiting for someone to fall into your traps. A Jim Nielsen is likely to tip off everyone to your pet legal theory. While Mr. Nielsen has been waiting for some innocent to write an article for nothing about mailing meters, some of us have hoped to have a chance to make a buck out of an opponent's reliance on private mailing meter postmarks.

Now that Mr. Nielsen has let the cat out of the bag ("Post-Dated Postmarks, Or, How To Mail a Letter Yesterday", 46 A.B.A.J. 949), the *Journal* might as well tell everyone how to know whether a mailing meter postmark means what it says.

As Mr. Nielsen has told us all, gratuitously, private mailing meters cannot necessarily be trusted. Any man with his own meter can postmark his mail with any date which strikes his fancy and there is at least a substantial chance that such letters will slip through the post office undetected. This does not mean, however, that all metered mail is suspect. The Post Office Department operates its own meters and its meters are different.

Vive la Différence!

Your mailing meter leaves a round postmark containing only the name of your city and state, and a date. Uncle Sam's meters give this information, but also print the letters "P. O." inside the circle.

Thus, when the mailing meter identifies itself as a Post Office machine, the postmark ought to be entitled to the presumptions attaching to the old fashioned cancellation of stamps. Certainly it is logical to presume that postal clerks are at least as scrupulous about changing their meters as they are in changing the dates on their cancelling machines.

As Mr. Nielsen suggests, however, when your back is against the wall it may not be a waste of time to investigate just how your crafty opponent managed to file that crucial pleading by mail on the last day—at least when you don't receive your copy until after advising your client that the other side has abandoned the case.

WILLIAM F. WALSH
Houston, Texas

BAR ACTIVITIES

Douglas M. Hicks

George Manlatis

At the opening session of the New Jersey State Bar Association midyear meeting at Atlantic City on November 18, Douglas M. Hicks, of New Brunswick, was inducted as President, upon the resignation of Superior Court Judge Theodore J. Labrecque, of Red Bank. Judge Labrecque, who was sworn into his judicial position on October 6, had been inducted as President last May.

Active in the New Jersey State Bar Association for many years, Mr. Hicks served as chairman of many committees and as Treasurer and Trustee.

Madison B. Graves

Madison B. Graves, of Las Vegas, was elected President of the State Bar of Nevada at the organization's annual meeting November 10-12 in Winnemucca. He succeeds Douglas A. Busey, of Reno. Installed as First Vice President was C. E. Horton, of Ely, and as Second Vice President, John C. Bartlett, of Reno.

Business sessions were interspersed with social events, including Basque dinners and a Basque festival presented by the Basque residents of this sheep-raising locality.

High points of the annual meeting were a mock trial, in which deliberations of the closeted jury were broadcast to the courtroom, and a Legal Institute on the Unauthorized Practice of Law.

Arranged by Leonard T. Howard, of Reno, the Legal Institute heard Oglesby H. Young, Chairman of the Unauthorized Practice of Law Committee of the Oregon State Bar, and Warren H. Resh, Assistant Attorney-General of the State of Wisconsin.

The members of the State Bar also heard talks by Ninth Circuit Court of Appeals Judge Charles M. Merrill, former Chief Justice of the Nevada Supreme Court; University of California Law School Dean William L. Prosser, and Dean David E. Snodgrass of Hastings Law School.

Action taken by the State Bar members included:

Confirmation of an invitation to the American Bar Association to hold its 1965 Annual Meeting at Las Vegas. With its new convention center, members noted, Las Vegas has convention facilities equal to any in the United States.

Adoption of a resolution commending John Shaw Field, of Reno, Chairman of the Public Relations Committee, for a public relations program which has given the State Bar "increased stature in the eyes of the general public". Mr. Field has been chairman of the state public relations committee for ten years, is a state delegate to the American Bar Association and a member of that Association's Public Relations Committee.

Approval of periodic publication of a State Bar newsletter to supplement the State Bar Journal.

Continuation of the present annual dues schedule of $50 a year for senior attorneys, and $25 for new Bar members until two years after admission.

At the Annual Meeting of the New Mexico State Bar in Carlsbad, October 21-22, James T. Jennings, of Roswell, was elected President. Rufus C. Garland, of Las Cruces, was named President-Elect and First Vice President, and the Second Vice President is Jess R. Nelson, of Truth or Consequences, New Mexico.

James T. Jennings

Rodden

Among the speakers at the meeting were Whitney North Seymour, President of the American Bar Association, Professor Soia Mentschikoff, University of Chicago Law School, and C. Melvin Neal, of Hobbs.

Richer by ten years of experience and frustration in the legislative halls and at the polling places, the Illinois State and Chicago Bar Associations are again proposing an amendment to the judicial article of the state's constitution. The amendment is scheduled for introduction in the 1961 Illinois legislature convening in January.

"The proposal", an announcement of the associations states, "is designed to simplify the organization of the courts, to provide for a more efficient management of their business, to expedite the disposition of cases and reduce the expenses of litigation, to give deserving judges greater security of tenure in office and to improve the method of selection of judges by a system relatively free of partisan considerations."

A 29-member Joint Committee of the two associations has been named to explain the proposal to the Bench and Bar of Illinois and to urge its passage by the legislature. Stanford S. Meyer, of Belleville, heads the Committee, with Circuit Judge A. J. Scheineman, of Sterling, and Gordon Franklin, of Marion, as Co-Chairmen. William M. Trumbull, of the Northwestern University School of Law, serves as the Chicago Co-Chairman and as Secretary for the Joint Committee.

A tentative draft of the proposal was circulated widely throughout Illinois last fall in the monthly journals of both the Illinois State and Chicago Bar Associations. Special teams from the Joint Committee made calls on the state's judiciary to explain the proposal. At district meetings throughout

the state explanations of the amendment were made and discussions and questions were tape-recorded for later consideration by a "critique" subcommittee of the Joint Committee.

The two associations commenced their efforts for judicial reform in Illinois in 1950 with the formation of the first joint committee. In the 1953 Illinois legislature a proposed amendment passed the Senate by the necessary two-thirds vote, but failed in the House. In 1955 a second effort failed to win approval in either chamber. In 1957 the legislature passed a modified version from which it eliminated provisions relating to improved selection and tenure of judges, leaving the provisions for a consolidation of the trials courts and administrative centralization in the Supreme Court.

Because of the legislature's action, which was felt in some quarters to be an emasculation of the proposal, several long-time proponents opposed the measure when it went before the voters for adoption in the fall of 1958.

The amendment fell slightly short of the goal. It received 1,589,655 affirmative votes, against 893,503 negative, thus failing by 65,784 votes to receive the necessary two-thirds majority of those voting on the proposition. A recount suit was abandoned when the Supreme Court of Illinois ruled that neither check-marks in the "Yes" box on the ballot nor the writing in of "Yes" could be counted in favor of the proposal. *Scribner* v. *Sachs*, 18 Ill. 2d 400, 164 N.E. 2d 481.

Following the collapse of the recount proceeding, the two associations decided to resubmit a judicial reform amendment to the 1961 legislature. They determined, moreover, to stand by the inclusion of improvements in judicial tenure and selection, which had been in all versions of the proposal until dropped in 1957 by the legislature. A drafting group produced the amendment now ready for the legislators.

The present proposal, in addition to consolidating trial courts and providing the Supreme Court with administrative powers and aids to direct an integrated judicial system, contains a unique hybrid selection and tenure system based on the American Bar Association plan, frequently referred to as the "Missouri Plan". The new departure in the Illinois proposal stems from a separate consideration of selection and tenure, rather than thinking of them as inextricably yoked.

Thus the Illinois plan proposes no change in the method of selection of judges unless a further referendum, which is required by the amendment's schedule, so directs. As to tenure, however, a judge at the conclusion of his term submits himself for re-election at a general election "on a special judicial ballot without party designation, on the sole question whether he shall be retained in office for another term".

Illinois judges are nominated either by a party convention or in a party primary and elected on a partisan political ballot. The proposed amendment itself does not change this, but it does require that a later referendum be held at which there is a vote on the adoption of a selection system by which judicial nominating commissions, composed on a non-partisan basis of equal numbers of lawyers and laymen, will nominate one candidate for a judicial office, and that candidate's name alone goes on the ballot without party designation on the simple question whether he shall be elected to the judgeship. By this method the ultimate selection of judges remains in the hands of the people.

If the proposed amendment is passed by the legislature in 1961, it will be proposed to the people in November, 1962, and must receive a two-thirds majority of all persons voting on it, or a simple majority of all persons voting at the election. If the amendment is adopted in 1962, the referendum on adoption of the new judicial system will be held in November, 1964.

The proposed amendment abolishes justices of the peace, but provides for appointment by the circuit courts (the courts of general trial jurisdiction) of magistrates, who must be lawyers, and special magistrates, who need not be lawyers. The fee system is also abolished, rendering permanent statutory law enacted in 1959.

The Supreme Court remains as a seven-member tribunal, but the state is reapportioned to give Cook County (Chicago), which contains more than half the state's population, three justices. Cook County, along with four surrounding counties, constitutes one district and elects one justice at present. All judicial personnel in office at the time the amendment becomes effective, however, will be retained in office and any changes in districting will become effective only as incumbent judges die, retire or choose not to submit themselves for re-election.

Department of Legislation

Charles B. Nutting, Editor-in-Charge

In a previous issue Mr. Zinn discussed the National Legislative Conference. He now turns his attention to an international organization. As a member of the executive committee of the Association of Secretaries General of Parliaments and as rapporteur of the report on the Arrangement of Parliamentary Business he is especially qualified to write on this subject.

The Inter-Parliamentary Union

by
Charles J. Zinn
Law Revision Counsel, U. S. House of Representatives, Judiciary Committee

The United States Congress is a charter member of the oldest international organization dedicated to peace —the Inter-Parliamentary Union, an international association of a semi-official character consisting of national groups formed within the respective national legislatures. It was established in 1889 and, of the present membership along with the United States Congress, the Parliaments of Belgium, Denmark, France, Great Britain, Hungary, Italy, Liberia and Spain participated in that first year.

Background

For some time during the latter part of the nineteenth century the idea was advanced that war could be averted through international arbitration and through the mutual efforts of the members of the different parliaments. Finally, in 1888, at the behest of Sir William Cremer, a British member of Parliament, and Frederic Passy, a member of the French Chamber of Deputies, with encouraging action by President Cleveland, a meeting was held at Paris attended by about thirty parliamentarians of the two countries to consider plans for the creation of an international organization of members of parliaments for the purpose of advancing arbitration of international disputes. As a direct result of that meeting the first Inter-Parliamentary Conference took place in June, 1889, attended by ninety-six representatives of the nine countries mentioned. With international peace as the underlying motivation for the creation of the Union it is not surprising that at that first meeting a resolution was introduced in support of simultaneous and proportional disarmament.

Three years later the Conference established a central organ called the Inter-Parliamentary Bureau for International Arbitration, and two years later the statutes of the Union were adopted.

Purpose and Organization

As defined by its statutes, the aim of the Inter-Parliamentary Union is to promote personal contacts among members of all parliaments constituted into national groups and to unite them in common action to secure and maintain the full participation of their respective states in the firm establishment and development of democratic institutions and in the advancement of the work of international peace and cooperation, particularly by means of a universal organization of nations. With this object in view, the Inter-Parliamentary Union also studies and seeks solutions for all questions of an international character suitable for settlement by parliamentary action and may make suggestions for the development of parliamentary institutions with a view to improving the working of those institutions and increasing their prestige.

The Union is composed of national groups constituted in parliaments functioning as such within the territory of which they represent the population, in a state recognized as a subject of international law. Prior to 1955, any parliament could become a member on its own initiative but in that year the statutes were amended to provide the recited requirements. Communist China has been denied admission and, at the recent conference at Tokyo, the application by North Korea was also rejected while approval was given to the application by Canada for readmission after a lapse in its membership since the beginning of World War II. Several new African countries have also been admitted in recent years and an invitation was extended to Nigeria during the conference at Tokyo.

Membership within each national group is extended to each member of the national parliament and to ex-members who have been members of the Inter-Parliamentary Council—the governing body of the Union—or who have rendered distinguished services to the Union and are admitted on this ground by the Council on the recommendation of their group, as honorary members of the latter.

The Inter-Parliamentary Council

The Inter-Parliamentary Council is composed of two members designated by each national group for a term lasting from one annual conference to the next. It elects its president for a period of three years, which may be extended for a further period of two years. At the recent Tokyo conference the term of Dr. Giuseppi Codacci-Pisanelli, a member of the Italian cabinet and a leader of the Christian Democratic Party of Italy, was extended for an additional two years—his original election having taken place at the London Conference in 1957. The Council is a most important body with respect to the annual Inter-Parliamentary Conferences since it summons the Conferences and fixes their agenda and place of meeting and may propose resolutions itself as well as passing upon all draft resolutions submitted for consideration. The Council may institute permanent or temporary study committees and, in general, take any steps necessary to realize the aims of the

Inter-Parliamentary Union. In particular, it may, in the interval between conferences, make a public declaration of opinion in the name of the Union with regard to international problems which come within the field of action of the Union.

The Council also has the authority of proposing the members of the Executive Committee.

The Executive Committee

The Executive Committee is the administrative organ of the Inter-Parliamentary Union. Until the 1960 Conference at Tokyo it consisted of eight members, in addition to the President of the Council, belonging to different national groups, but at that conference the number was increased by two, to increase the geographical representation on the Committee. The Conference elects the Executive Committee members from among the members of the Inter-Parliamentary Council proposed by the Council for a term of four years; retiring members are ineligible for re-election for two years and cannot be replaced by a member of the same national group. Representative Harold D. Cooley, of North Carolina, the President of the United States Group, is a member of the Executive Committee.

The Executive Committee meets at least twice a year on the call of the President of the Council and may hold extraordinary meetings at the request of two members of the Committee or if the President deems it necessary. It performs all functions delegated to it by the Council, and it examines and adopts the draft budget for each financial period for submission to the Council. The principal source of revenue for the operation of the Union is annual contributions made by the national groups more or less according to a scale of assessments devised to make the payments equitable. For several years the American group has been contributing $18,000 annually, pursuant to an appropriation for that purpose.

The Executive Committee also exercises supervision over the Inter-Parliamentary Bureau.

The Inter-Parliamentary Bureau and the Secretary-General

The headquarters of the Inter-Parliamentary Union are located at Geneva, Switzerland, which is also the site of the offices of the Inter-Parliamentary Bureau under the direction of the Secretary General, who is appointed by the Council. Since 1953, M. André de Blonay has been the Secretary-General and is charged with the normal functions of a secretariat. The Bureau keeps the archives of the Union and collects documents relating to international arbitration and other documents regarding the objects of the Union. It prepares the draft budget and the questions to be submitted to the Council and to conferences and distributes the necessary documents in advance and it provides for the execution of the decisions of the Council and of conferences. It also acts as the secretariat for the study committees.

Study Committees

Much of the original work of the Inter-Parliamentary Union is done by either standing or temporary study committees appointed by the Council. At the present time representative committees are the Committee on Economic and Financial Questions, the Committee on the Reduction of Armaments, the Committee on Juridical Questions, and the Committee on Non-Self-Governing Territories and on Ethnical Questions. The committees meet regularly when conferences are held and when called by the President and each national group may send not more than three representatives to the meetings held during a conference. The committees appoint a rapporteur for each question considered and it is the duty of the rapporteur to lay the committee proposals directly before the Conference when the question has been entered on the agenda of the Conference. If three members of a committee so request, a report may not be presented to a conference before it has been discussed and approved at a plenary meeting of the committee. Furthermore, members of a committee forming a minority may present minority reports to be subjoined to the report of the committee and be submitted to the Conference simultaneously with the latter.

The reports of the committees in the nature of draft resolutions constitute the most important aspects of the agenda of the conferences. At the Tokyo conference a draft resolution on "Methods of Improving the International Distribution of Primary Products and the Relation of Their Prices to Those of Manufactured Goods" was presented by the Committee on Economic and Financial Questions, and the Committee on Reduction of Armaments presented a draft resolution on "Present Problems and Prospects of Disarmament". The Political Committee also submitted a draft resolution on "The Future of Parliamentary Democracy in Asia". These draft resolutions presented by the committees engender stimulating and interesting debates at the conferences.

The Inter-Parliamentary Conferences

Each year, usually in the autumn, a conference is convened by the Inter-Parliamentary Council in a different country on the invitation of the parliament of that country. The last conference held in the United States was in 1953 at Washington, D. C. Extraordinary meetings may be called by the Council or at the request of at least six national groups. The debate at the conferences is public but may be private if the Conference so decides by a two-thirds majority on questions relating to individual persons.

Each conference opens with a general debate lasting for three sessions on the basis of the report submitted by the Secretary-General and bearing in part upon the general political situation of the world, during which each nation may have two speakers with a maximum time of fifteen minutes for both. A member may not speak without the consent of the President, nor more than twice on the same question and the Conference may limit debate in advance. The work of the Conference is then proceeded with in accord with the agenda that have been prepared by the Council, usually listing several draft resolutions from the study committees which may also, with the approval of the Council, ask the Confer-

ence for an opinion without debate on a draft resolution submitted two months in advance. During the course of discussion of a draft resolution, amendments may be offered and must be disposed of before the Conference votes on the question to which they relate. Draft resolutions or motions which are not on the agenda may be discussed and voted upon only by permission of a two-thirds majority of the Conference. Except as otherwise provided the decisions of the Conference are reached by a majority vote of the members present entitled to vote. Each national group has a minimum of eight votes and additional votes on a graduated scale depending upon their population. For example, countries with a population of from one to five million inhabitants have one extra vote, while the United States, having between 150 and 200 million inhabitants, is entitled to eleven extra votes. Voting is by a show of hands although a roll-call vote may be demanded by any member. Each member votes individually and consequently there may be a splitting of votes within a national group.

The official languages of the conferences are English and French and during the meetings simultaneous interpretation into and from these languages is carried out under the responsibility of the Bureau—usually including interpretation into the language of the host country. At the conclusion of each session a résumé is prepared in the official languages and promptly made available to the members and to the public.

Each national group may send to the conferences a number of delegates equal to the number of votes it is entitled to, and frequently the national delegations include observers as well as their own secretariat. Each national group is obligated to keep its parliament informed of resolutions adopted at the conferences which require parliamentary or governmental action and to notify the Bureau of the action taken thereon.

The conference held at Tokyo from September 29 to October 7, 1960, was the forty-ninth conference and was attended by some five hundred delegates from about fifty countries, together with observers and members of the secretariat. The 1961 Conference will be held at Brussels from September 10 to 18, and, in accordance with the practice since World War II, the Council will meet in the spring at Lausanne from April 4 to 10. At the spring meeting the agenda for the annual conference will be worked out.

The American Group

At the twenty-eighth conference at Geneva in 1932, the American group adopted its own by-laws under which every Senator and Representative in the Congress of the United States is *ipso facto* a member of the group. Provision is also made for the election of honorary members. Representative Harold D. Cooley, president of the group, and Senator A. S. Mike Monroney, a Vice President, are the American members of the Inter-Parliamentary Council. The American group has been active in the work of the Union and has representation on the Executive Committee as well as on several of the standing study committees. At the conference in Tokyo Representative Daniel K. Inouye, from Hawaii, was granted permission to address the conference in the Japanese language, and at Warsaw in 1959 Representative Thaddeus M. Machrowicz was permitted to address the Conference in Polish, his native language. These activities on the part of American members attracted great interest from the other delegations and from the public where the conferences were being held.

Association of Secretaries-General

In 1938, the Association of Secretaries General of Parliaments (then known as the Autonomous Section of Secretaries-General of Parliaments) was founded within the framework of the Inter-Parliamentary Union, bringing together the high officials of legislative assemblies. Membership is not limited to officials of parliaments that are members of the Union, although at the present time it is made up of officials of those parliaments only.

The Association compares technical methods in use in different parliaments to decide upon measures for the improvement of those methods and to propose means of insuring co-operation between parliamentary services. The work of the Association is accomplished by means of reports by designated rapporteurs upon various subjects of interest, based upon replies received from the parliaments to questionnaires previously distributed. Recent questions considered by the Association have been the "Extent of the Control of the Executive by Different Parliaments", the "Arrangement of Parliamentary Business", "Interpellations and Analogous Procedures", and the "Right to Petition". Usually the rapporteur prepares a draft questionnaire which is considered in detail at a plenary meeting of the Association after having been distributed some time in advance. At a subsequent meeting he submits a final questionnaire which, after approval by the Association, is sent to each parliament for reply. When he has received the replies within the specified time he then prepares a draft report which is also considered in detail at a plenary meeting, and after revision, at a subsequent meeting he submits the final report which is adopted after detailed consideration by the Association. The reports are published in the valuable quarterly publication of the Association, *Constitutional and Parliamentary Information*. Orders for subscriptions to that publication (and to the *Inter-Parliamentary Bulletin*, the official organ of the Inter-Parliamentary Bureau) may be sent to the Inter-Parliamentary Bureau, 6 Rue Constantin, Geneva. A number of law libraries in the United States are among the subscribers of both publications, each of which is printed in a French and an English edition, and find them informative and useful. The Association has published a most valuable comparative study of the legislative process in European countries, entitled, *European Parliamentary Procedure* by Lord Campion and David W. S. Lidderdale.

The Association elects its president and other officers, and an executive committee consisting of six members elected for three years from different countries. Sir Edward Fellowes, Clerk of the British House of Commons, president for the past four years, has recently resigned because of his im-

pending retirement from the House of Commons and has been succeeded by M. Schepel, of the Netherlands. The executive committee, the Association's governing body, initiates subjects of study and adopts the agenda for meetings of the Association which are held at the same time and place as the Inter-Parliamentary conferences.

Relations with International Institutions

From its inception, while retaining its own independence, the Inter-Parliamentary Union has manifested a deep interest in the development of other international institutions. It played an important role in the calling of the First and Second Hague Conferences on International Peace. After the creation of the European Coal and Steel Community and the Council of Europe it established relations with them on a consultative basis, and in this hemisphere it maintains relations with the Organization of American States.

With respect to the United Nations the Union has been granted category A consultative status by the Economic and Social Council, and it has consultative arrangements with UNESCO. Representatives of the United Nations and other international organizations frequently attend the Inter-Parliamentary Conferences as observers. At the 1960 spring meeting at Athens, Senator Monroney proposed a resolution to carry on negotiations with the United Nations with the view of establishing a relationship comparable to that of a specialized agency, while maintaining the Union's independence and autonomy.

Both the Inter-Parliamentary Union and the Association of Secretaries-General of Parliaments are important international organizations which unfortunately are not sufficiently well known to the average American lawyer and legislator in the state and local legislative bodies. They are comparable to the National Legislative Conference on an international scale. Although their activities do not have any binding legislative effect on the governments of their members they do provide important and valuable information. Perhaps the most significant contribution they can make to international welfare is the providing of a meeting place where members of different legislative assemblies can meet and discuss their mutual problems and give each other the benefit of their own experiences. This opportunity to supply information and to dispel misinformation is one of the most effective weapons available today in fostering better understanding among the countries of the world which is so essential to survival.

Activities of Sections

SECTION OF CORPORATION, BANKING AND BUSINESS LAW

Section members and others who attended the Southwest Regional Meeting of the Association at Houston, Texas, were rewarded with two excellent programs on November 10, under chairmanship of Samuel B. Stewart, of San Francisco, Chairman-Elect of the Section. At the morning meeting a panel discussion on "Where To Find Money" was presented by the Committee on Developments in Business Financing under the chairmanship of Robert C. Barker, of Chicago, who presided. Composing the panel were Larry D. Gilbertson, General Counsel, Small Business Administration, Washington, D. C.; Gerald B. Haeckel, Assistant Vice President-in-Charge Regional Investment Office, New York Life Insurance Company, Dallas; Jack I. Levinson, Assistant General Counsel, C.I.T. Financial Corporation, New York City, and Eugene McElvaney, Senior Vice President, First National Bank, Dallas; with Ray Garrett, Jr., as moderator.

At the afternoon meeting, at which Eugene J. Conroy, Secretary of the Section, presided, George A. Blackstone, of San Francisco, spoke on "What Is Expected of the Attorney for the Financing Corporation in an Equity Financing"; Greene F. Johnson, Associate General Counsel of the Metropolitan Life Insurance Company of New York, on "What Is Expected of an Attorney for the Financing Corporation in an Insurance Loan Financing"; and Sydney Krause, Chairman of the Section's Committee on Commercial Bankruptcy, on "If the Roof Falls In".

The November issue of *The Business Lawyer*, which has just been distributed to Section members as one of the benefits of membership, is of especial interest to those who were unable to attend the Association's Annual Meeting at Washington, D. C. Among the stimulating articles there reported are three addresses on the general subject of protecting America's interests abroad, General Robert Cutler, of Boston, speaking on "The Inter-American Development Bank", C. Tracy Barnes, of Washington, D. C., on "Some Thoughts About Intelligence" and Allen W. Dulles, of Washington, D. C., on "The Central Intelligence Agency".

On the general subject of "Problems

of Inflation From the Standpoint of Industry and Government" presented to the joint general session with the Section of Public Utility Law, James F. Oates, Jr., discussed "Growth Without Inflation" and Fred C. Scribner, Jr., "Economic Outlook", both addresses being reported in full.

The November issue also contains addresses of especial interest to the business lawyer in the fields of Food, Drug and Cosmetic Law, including addresses by Earl W. Kintner on "Federal Trade Commission Regulation of Food, Drug and Cosmetic Advertising"; by John L. Harvey on "Administrative Policy in the Administration and Enforcement of the Food Additives Amendment"; and by William W. Goodrich on "Safe Food Additives and Additives Generally Recognized as Safe—There Is a Difference".

Written especially for the November issue of *The Business Lawyer* are the articles by Thomas F. Duffy, of Chicago, on "Business Financing by Commercial Banks"; by John G. Sobieski, Commissioner of Corporations of California, on "Fractional Shares in Stock Dividends and Splits"; and by Albert H. Sealy, Jr., of Dayton, Ohio, on "Acquisitions and Mergers".

Section members will shortly receive a questionnaire requesting information for the forthcoming third edition of the directory of Section members and for the supplement on corporate law departments. Prompt response in full to the questionnaire will greatly assist its preparation and publication.

SECTION OF FAMILY LAW

In addition to the normal committee activities of the Section of Family Law, including the preparation and publication of *The Family Lawyer* and the proceedings of the Washington Annual Meeting, the major activity of the Section has been devoted to considerations of appropriate areas of research in co-operation with the American Bar Foundation and in encouraging and co-operating with institutes and meetings in the field of family law. This latter activity is proving to be the most popular and effective vehicle for bringing an awareness of the important developments in family law to the practicing Bar. A program was produced in Houston, Texas, at the Southwest Regional Meeting under the Chairmenship of W. Scott Red, of Houston, and Dean W. Page Kelton, of the University of Texas Law School. Judge Dorothy Young, of Tulsa, Oklahoma, member of the Council, presided.

The Florida State Bar Association held a Family Law Institute at Jacksonville, Florida, on December 2-3, with Philip A. Webb III, Chairman. He was assisted by Irene Redstone, of Miami, Florida, Chairman of the Section's Committee on Support. The key speaker was Clarence Kolwyck, of Chattanooga, Tennessee, past Chairman of the Section. An institute is being planned for January or February in New England by Judge David Jacobs, of Meriden, Connecticut, member of the Council, and Dean Robert F. Drinan, S.J., of Boston College Law School, Chairman of the Section Committee on Marriage Laws. Sol Morton Isaac, the Chairman of the Section, has agreed to participate. On February 17, 1961, the Milwaukee Bar Association will hold a conference on marriage counselling under the Chairmanship of Aaron L. Tilton, of Milwaukee, Chairman of the Section's Committee on the Practicing Lawyer. The principal speaker will be Judge Theodore B. Knudson, of Minneapolis, Minnesota, Chairman of the Section's Committee on the Judge. Plans are now being made for extensive participation in the Mid-Central States Regional Meeting at Indianapolis, May 10-13, under the Chairmanship of Carl F. Ingraham, of Birmingham, Michigan, member of the Council, and, of course, the entire Section will co-operate to produce an outstanding program in St. Louis in August. The Section can not always assure every interested group a speaker, but it welcomes the opportunity to consult with every group on a program and will bend every effort to produce outstanding programs whenever they are desired.

In addition to the foregoing, it should be noted that the American Bar Association will be represented at the White House Conference on Aging, January 9-12, 1961, through this Section. The delegate will be Judge Godfrey L. Munter, of Washington, D. C., former Chairman of the Section. He will welcome any requests from other Sections for participation in the conference. This is an unusual opportunity for the organized Bar to meet with the medical and social work organizations in a co-operative discussion of problems of mutual concern.

Finally, we have been advised that a number of local and state bar committees have been changing their names to the Committee or Section on Family Law. The latest to come to our attention is the Domestic Relations Committee of the Ohio State Bar Association. This identification and, hopefully, the subsequent liaison will prove the most beneficial route to improved laws and procedures.

OUR YOUNGER LAWYERS

Kenneth J. Burns, Jr., Chicago, Illinois, Vice Chairman,
Junior Bar Conference, Editor

Conference Accomplishments to Date

The first four months of the Conference year 1960-61 have already marked noteworthy achievements. Committees are well into their programs for the current year, state and local junior bar organizations are working hard to accomplish their goals, and Conference officials are making contacts in areas where there has been little or no junior bar activity as well as in areas where there are outstanding junior bar units. Areas of activity where achievements have already been realized are as follows:

The Conference's Membership Committee is promoting admission ceremonies in states where such ceremonies are not now being held. The committee has solicited the further co-operation of the state chairmen of the junior bar groups throughout the country, and these efforts promise more ceremonies this year and increased American Bar Association membership as a result. The program of the committee is in two categories. In states where adequate admission ceremonies are being held, the committee proposes to encourage the continuance of the ceremonies and the establishment of a social function in connection with them. In states where admission ceremonies are not now being conducted, the committee is assisting the state organizations in setting up such ceremonies. The co-operation of state chairmen is vitally needed in organizing new programs.

The members of the Committee on the Status of the Young Lawyer in Government have been meeting regularly to discuss procurement of government placement information, the use of government lawyer survey results, and other matters of interest. During a recent meeting, the committee endeavored to resolve the present limitations in the Young Attorney Government Placement Service. These limitations have been traced to the following factors: (1) recent government agency personnel cutbacks; (2) the absorption of 7½ per cent pay increase by non-replacement of outgoing personnel, and (3) government legal employment has become so much more sought after lately that openings are not advertised as they used to be. The committee is at present reorganizing the program so that the legal vacancies will be reported on a regular bi-weekly basis. Another revision of the program will expand agency coverage to include not only the thirty large agencies but also the other thirty-seven agencies of smaller size.

The Medico-Legal Committee has been working on the establishment of a speakers' bureau of medico-legal experts for use at state and local bar association meetings, codification of the law relating to mental health, a study of the effectiveness of court-appointed impartial medical examiners, a study of medico-legal courses offered in law schools, and the drafting of a brochure containing the titles of medico-legal texts and treatises and medical texts which discuss various injuries and areas of medical study. The brochure will provide a practical aid for young lawyers in this field.

James R. Sweeney, of Chicago, Chairman of the Unauthorized Practice of Law Committee, expects even more activity in this area than last year. The goal of the committee is to arrange at least one lecture in each of the law

Conference Government Lawyers Committee meets with Chairman Roger W. Jones of the U. S. Civil Service Commission at luncheon, November 22, 1960.

Standing (left to right): Seymour K. Hale, Civil Service Commission; Edward Willett, Civil Service Commission; Kurt Berlin, NASA; Jack Stark, Subcommittee on Legislative Oversight; Lt. Richard E. Wiley, Army JAG; Capt. Hugh J. Dolan, Air Force JAG; Lt. James Green, Army JAG; George Michaely, SEC; Alan H. Kaplan, formerly HEW. Seated (left to right): Ruth Picknell, Treasury OGC; J. Gordon Cooney, FTC; Marylin Hale, General Accounting Office; Roger W. Jones, Chairman, Civil Service Commission; Edwin S. Rockefeller, FTC, Committee Chairman; Richard B. Berryman, Navy OGC; Robert Becker, HEW.

schools in the United States on the subject of the unauthorized practice of law with particular emphasis on reaching the graduating seniors and warning them of the danger of inadvertently getting into unauthorized practice. Prominent members of the Bar present these lectures when they have been arranged by the committee. Each committee member has been given the responsibility to see that such a lecture is arranged in a particular law school in his area.

One area of activity with which the Pre-Practice Orientation Committee is busily engaged is the promotion of pre-law clubs. The committee is making final arrangements for the publication of a brochure concerning the orientation of pre-law students. The approach taken is to work both with organized clubs and to help organize clubs. The Conference is looking forward to a very successful year in this field, in helping to attract the ablest young men and women to the legal profession.

Another committee which has been functioning with much enthusiasm is the Annual Meeting Conference which is making arrangements for the biggest and finest annual meeting in the history of the Conference to be held in St. Louis in August, 1961. The program for the meeting has been formulated and consideration is now being given to the selection of top-notch speakers for the various functions. Conference members should plan now to attend.

Conference Officials Travel

During the past several months, Conference officials have been invited to attend bar association meetings in a number of states. James R. Stoner, Secretary, attended a luncheon on November 30 in Kansas City with Robert B. Olsen, Chairman of the Kansas City Junior Bar, and other members of that section. That evening at the dinner meeting of the Kansas City Lawyers Association, he presented the Junior Bar with a plaque for Honorable Mention in the 1959-60 Award of Achievement competition. Over 400 were in attendance, including former President Harry S. Truman and former Secretary of State Dean Acheson. While in Kansas City, Mr. Stoner had an opportunity to meet with several local committee chairmen to discuss junior bar work and familiarize them with the activities of the Junior Bar Conference. The Kansas City Junior Bar is to be commended for its work in the field of continuing legal education.

Kenneth J. Burns, Jr., Vice Chairman, attended the annual Fall Smoker of the Milwaukee Junior Bar Association at which time he presented that organization with a plaque for Honorable Mention won in the Award of Achievement competition in the category of cities with a population of over 500,000. Two areas in which the Milwaukee Junior Bar has been most active include the Foundations of Freedom program, which is designed to present to the teachers in public, private and parochial schools a series of talks on the Bill of Rights, and participation in a local television program at which its members discuss legal subjects of interest to women.

In addition to Chairman William Reece Smith's travels to state and local bar associations, he recently addressed a legal fraternity at the University of Florida. Mr. Smith attended a meeting of the Junior Bar Section of the Detroit Bar Association on December 18 where he presented them with the award of "Local Junior Bar of the Year". The Detroit Junior Bar Section was chosen the most outstanding local junior bar in the nation among cities with a population of over 500,000. Scheduled are visits to Columbia, South Carolina, and Washington, D. C.

Report to Locals and Conference Directory Available

This year's editions of the above two publications were published and mailed recently. The *Report*, which describes the Conference's Washington Annual Meeting, was sent to state and local junior bar presidents, Conference Assembly delegates and alternates, and those in attendance at the 1960 Annual Meeting. The *Directory*, which includes information about the Conference, its By-Laws, Conference Assembly rules, and the names and addresses of Conference members active this year, has been mailed to all persons whose names appear therein. Conference members interested in receiving either of these publications are invited to write to Junior Bar Conference Headquarters at the American Bar Center, 1155 East 60th Street, Chicago 37, Illinois.

Conference Seeks New Administrative Assistant

Lowell R. Beck, who took up his duties as Assistant Director of the Washington Office of the Association on December 1, has resigned as Administrative Assistant of the Conference, and that position is now open. Any Conference member interested in this position is asked to contact the Headquarters Office, American Bar Center, Chicago 37, Illinois.

Practicing Lawyer's guide to the current LAW MAGAZINES

Arthur John Keeffe, Washington, D. C., Editor-in-Charge

EXECUTIVE PRIVILEGE: In its November, 1960, issue the *Practical Lawyer* ($8.00 per year; 133 South 36th Street, Philadelphia 4, Pennsylvania) carries an article by Paul A. Porter, the well-known Washington, D. C., lawyer, entitled "Discovery Against the Government—The Problems of the Private Practitioners".

It warms the cockles of my heart.

I thought it wrong for the Judge Advocate General of the Army to refuse me the Staff Judge Advocate's review of the man I was defending, especially when he gives these to the Court of Military Appeals ("Jag Justice in Korea", 6 *Cath. U. Law Review* 1).

I thought Admiral Straus, J. Sinclair Armstrong and Rowland Hughes should have testified before Senators Kefauver, O'Mahoney and Langer to what Sherman Adams said to them at the White House with respect to the Dixon-Yates contract.

I thought Mr. Justice Brennan was never more right than when he made the Government give to the lawyer defending Jencks the statements of the paid informers who testified against him.

And I go Mr. Porter one better and believe that the Jencks statute (Section 3500 of Title 18 U.S.C.) is unconstitutional, and said so. ("Jincks and Jencks", 7 *Cath. U. L. Rev.* 21.)

I wept when the Supreme Court refused to uphold the magnificent decision of the able Judge Hartshorne in the *Procter & Gamble* antitrust case where the Government was ordered to produce documents in an endeavor to prove what we all know, namely, that for lack of subpoena power, the Justice Department trust buster uses the antitrust criminal suit to prepare his civil action.

All these matters and many more, Paul Porter discusses clearly and simply, and he collects many relevant law review articles and pertinent decisions. Speaking of the decision of Mr. Justice Reed at the Court of Claims in *Kaiser Aluminum* v. *United States*, 157 F. Supp. 939, 141 Ct. Cl. 38, Porter says, "This opinion, if followed, could represent a significant expansion of the Government's privilege. . ."

And I agree. And so do John Mitchell, Congressman Moss and Berny Schwartz. But Herman Wolkinson does not and neither did F. Trowbridge vom Baur as General Counsel of the Navy.

But then I wonder how Paul Porter felt when, as he says, he was "a former administrator of a great agency"?

Let's face it. We lawyers have a tough row to hoe against the executive privilege of any party in power. For this reason, this piece of Porter's with its valuable references and suggestions for some limitations in the exercise of the privilege is a valuable contribution.

GERRYMANDER: Ever since the famous painter, Gilbert Stuart, in 1812 painted a Massachusetts election district created by Elbridge Gerry, then Governor of Massachusetts, to look like a salamander, the word *gerrymander* has been in our language. And, on November 14, 1960, the Supreme Court in *Gomillion* v. *Lightfoot* (Docket No. 32, 29 U. S. Law Week 4024) held that the complaint with respect to the Gerrymander in Tuskegee, Alabama, which formed that city "into a strangely irregular twenty-eight sided figure", resembling a sea dragon, and redefined Tuskegee's boundaries so as "to remove from the city all save only four or five of its 400 Negro voters", stated a cause of action under the Fifteenth Amendment. All Justices but Mr. Justice Whittaker joined the opinion written for the Court by Mr. Justice Frankfurter. While he joined the Court's opinion, Mr. Justice Douglas did say that he, nevertheless, adhered to the dissents in *Colegrove* v. *Green*, 328 U. S. 549, and *South* v. *Peters*, 339 U. S. 276. Mr. Justice Whittaker concurred in the Court's result but stated that the complaint was good under the equal protection clause of the Fourteenth Amendment as construed in *Brown* v. *Board of Education*, 347 U. S. 483, and *Cooper* v. *Aaron*, 358 U. S. 1.

When reviewing law review pieces that are published without the signature of the author, it has been the practice of this Department to give the anonymous author the name of "George Spelvin". I am aware of the use of this name by Westbrook Pegler to characterize the average American, but actually "George Spelvin" is a theatrical name that antedates Pegler. As William Rose Benét tells us (*Reader's Encyclopedia* published in 1948 by the Thomas Y. Crowell Company), it is the name of a mythical actor used by an actor who plays two or more parts in one play.

My first contact with "George Spelvin" came at the Cherry Lane theater in Greenwich Village. One night *Cox and Box* was being played as a curtain raiser to the *Pirates of Penzance*. One of the actors, a favorite of us Gilbertians, appeared in both plays. In *Pirates* the program listed him under his own name; but in *Cox and Box*, he was "*George Spelvin*".

I say all this because in the October issue of the *Journal* (46 A.B.A.J. 1145) I used the name "*George Spelvin*" in discussing the valuable note on *Gomillion* v. *Lightfoot*, 270 F. 2d 594, which appeared in the *Washington University Law Quarterly* (1960, No. 3, pages 292-301, St. Louis, Missouri, $1.25 per copy). I have since discovered that this excellent note was written by James M. Herron under the supervision of Professor Neil N. Bernstein,

of the Washington University Law School faculty. His note is the more timely because, since the Tuskegee case was reversed, the Court noted probable jurisdiction on November 21, 1960, in *Baker* v. *Carr*, Docket Number 103 (29 U. S. Law Week 3154). In that case, Hobart F. Atkins and C. R. McClain, of Knoxville, Robert H. Jennings, Jr., Z. T. Osborn, Jr., and Harris A. Gilbert, of Nashville, J. W. Anderson and E. K. Meacham, of Chattanooga, Walter Chandler, of Memphis, and Charles S. Rhyne, Herzel H. E. Plaine and Lenox G. Cooper, of Washington, D. C., seek to upset the Tennessee state gerrymander under which rural areas there have greater voting power than metropolitan centers (29 U. S. Law Week 3010-3011).

INDIANS: The *Federal Bar Journal* in 1960 has a new format but it continues to publish valuable symposia in federal fields. For instance, in its summer, 1960, issue, mailed in the brown-October-ale season, it has a collection of articles on Indians.

Thomas Meeker, General Counsel of the S.E.C., currently President of F.B.A. and a member of the Wisconsin and District of Columbia Bars, writes a foreword. Samuel J. Flickinger, Chairman of the Federal Bar Association's Indian Law Committee, writes on "The American Indian", pages 212-216; Arthur Lazarus, Jr., of the New York Bar on "Indian Rights Under the Federal Power Act", pages 217-22; William B. Benze, of the District of Columbia Bar, Chief of the Branch of Law and Order in the Bureau of Indian Affairs of the Interior Department, on "Law and Order on Indian Reservations", pages 223-229; Marvin J. Sanosky, of the Minnesota and District of Columbia Bars, on "Oil, Gas and Other Minerals on Indian Reservations", pages 230-234; Ralph A. Barney, of the Oklahoma and District of Columbia Bars, Chief of the Indian Claims Section of the Lands Division in the Department of Justice, on "Some Legal Problems Under the Indian Claims Commission Act", pages 235-239; Robert W. Barker of the Utah and District of Columbia Bars, on "The Indian Claim Commission—the Conscience of the Nation in Its Dealings with the Original American", pages 240-247; George W. Abbott, of the Nebraska Bar, Solicitor of the Interior Department, on "The American Indian, Federal Citizen and State Citizen", pages 248-254; and finally, Elmer F. Bennett, Under Secretary of Interior, on "Federal Responsibility for Indian Resources", pages 255-262.

In his piece, Robert W. Barker discusses how in 1946 the Indian Claims Commission was created to decide claims arising prior to August 13, 1946. Claims thereafter go to the Court of Claims. This commission has three members and sits *en banc* hearing cases *de novo* without hearing examiners. August 13, 1951, was the deadline to file claims before it. Eight hundred and fifty-two claims and 370 different dockets or cases had been filed by that date and as of May, 1959, 154 had been disposed of, twenty-nine of which were subject to appeal.

The Barker piece is very valuable in that he suggests needed reforms.

As you would expect, Mr. Barker believes the Section in the Department of Justice that tries these cases is understaffed. And, of course, counsel for both sides procrastinate. But what interests me is that this able and experienced practicing lawyer urges greater use of pretrial and, as the Commission is "within the scope of the Administrative Procedure Act", the use of trial examiners. Those of us who have studied their use in other agencies have sometimes wondered whether *en banc* consideration in many instances might not be more expeditious in the long run. And Mr. Barker has other suggestions, such as permitting interlocutory appeals, worth careful consideration.

It is interesting, indeed, to know that "a proposal in an appropriations act would have granted the General Accounting Office a right to review certain of the Court of Claims awards", page 246, but Mr. Barker tells us that "concerted action by the Bar and interested legislators was effective in defeating this action, retaining the judicial integrity of the Court", page 246.

A valuable symposium that you can obtain by writing F.B.A. at 1737 H Street N.W., Washington, D. C., and sending $5.00 if a non-member of F.B.A. or $3.00 if a member, for a year's subscription, or $1.50 for a single copy.

JOINT VENTURES: The author of the song "You're As Hard To Hold as Quicksilver" was very likely inspired by the widespread and seemingly indefinable doctrine of the joint venture. It strains the legal mind to think of a concept that occurs more often and still so defies pinning down. Nonetheless, my friend Walter H. E. Jaeger in "Joint Ventures: Origin, Nature, etc." (in Vol. IX of *American University Law Review*, pages 1-23, 111-129, price: $2.50 per year; single issue $1.50; 2000 G Street N.W., Washington 6, D. C.) has done a really splendid job of outlining the elements, prob-

lems and functions of this important but amorphous notion.

The "Lady and the Tiger" dangers in writing law review articles are that one goes too deep, and loses his audience, or goes too shallow and writes a *Readers Digest* piece. Jaeger deserves three rousing huzzahs then, for playing Blondin the wire-walker and avoiding both these excesses while navigating the chasm of joint venture. In case you do not know, "Blondin" was Jean Francois Gravelet who lived 1824 to 1897 and first walked a wire over Niagara Falls in 1859 and kept doing it with wheel barrows and umbrellas until too old to move (see *Brewer's Dictionary of Phrase and Fable*, Harper Bros. Revised Edition 1953). His approach is just broad and concise enough to bird's-eye the whole field, and just scholarly and documented enough to make a whale of a good springboard for more serious delving.

No detailed treatise this, still it's a peach of a survey of the popular modern legal tool of joint venture. Worth looking at.

PATENTS: During the 86th Congress, the Patents Subcommittee of the House Space Committee under the Chairmanship of Congressman Erwin Mitchell, of Georgia (known as the "Mitchell Committee"), and the Monopoly Subcommittee of the Senate Small Business Committee under the Chairmanship of Senator Russell B. Long (known as the Long Committee), held hearings with respect to a proposed amendment to the Space Act under which the National Aeronautics and Space Administration (known to Washingtonians as "NASA") would be permitted to follow the policy of the Department of Defense and allow its contractors to keep title to inventions discovered in the performance of Government research and development contracts. Defense takes a royalty-free license for its purposes, but leaves title to such patents with its contractors to use and exploit in their own commercial businesses.

Since NASA has been dealing with the same contractors as Defense, it is an understatement to say that during these first years of its existence, that agency has had many an argument with its contractors as to who obtains title to inventions discovered under NASA contracts that turn out to have a commercial or extracurricular use. The problem is further complicated by the lack of a national patent policy and the inability of the Government to license a patent exclusively so as to insure its exploitation. NASA, Agriculture and AEC (Atomic Energy Commission) are unique in requiring that their contractors surrender title to their patents to the Government.

The discussion has now ascended or descended, depending on how you view it, to the law reviews. David M. Lewis, Jr., of Indianapolis, Indiana, a third-year student at the University of Virginia, and the writer collaborate on a piece in the January, 1961, *Catholic University Law Review* (Vol. 10, No. 1; address: 1323 18th St., N. W., Washington 6, D. C.; price: $2.00) entitled: "The Department of Defense Patent Policy at the Crossroads: An Argument for the Retention of Traditional Incentives". As its title indicates, it is a spirited defense of Defense patent policy.

In the Winter, 1961, *Federal Bar Association Journal* (1737 H St., N.W., Washington 6, D. C.; price, $1.50) there is a symposium on what the Federal Government's patent policy should be, which is a much larger and more important question.

To this symposium the following contribute: Commissioner of Patents Robert C. Watson; Senator Russell B. Long, Chairman of the Monopoly Subcommittee of the Senate Small Business Committee; Congressman Overton Brooks, Chairman of the full House Space Committee; John A. Johnson, General Counsel of NASA; Roland A. Anderson, Assistant General Counsel for Patents of A.E.C.; Elmer Gorn, Patent Counsel for the Raytheon Company; Richard Whiting, Chairman of the Government Patent Policy Study Committee; Wilson R. Mattby, Deputy Chairman of the Government Patents Board; and Graeme C. Bannerman, Director for Defense Department Procurement Policy, assisted by Howard C. H. Williamson, Defense Department Procurement Specialist, and R. Tenney Johnson, of the Office of the General Counsel in the Department of Defense.

Since the question promises to be as hot a potato in the 87th Congress as in the 86th and depends so much for its correct solution upon our national objectives and an understanding of the object of granting any patent monopoly to anyone, every lawyer who numbers an inventor among his clients will want at least to read this F.B.A. Symposium. If they are strong enough, they might also want to suffer what Dave Lewis, Jr., and I have written.

SYMPOSIUM ON CONSUMER CREDIT: Appearing in the current number of the *Northwestern University Law Review* is a symposium on consumer credit. The particular aspects of the subject covered in this symposium are as follows: (1) "Limiting Consumer Credit Charges by Reinterpretation of General Usury Laws and by Separate Regulation"; (2) "Technical Problems Arising Under Statutory Regulation of Finance Charges"; (3) "Revolving Credit (Department Stores and Banks)"; (4) "Consumer Credit Insurance"; (5) "Relief for the Wage-Earning Debtor: Chapter XIII of the Bankruptcy Act, or Private Debt Adjustment?"; (6) "Finance Companies and Banks as Holders in Due Course of Consumer Installment Credit Paper"; (7) "Enforcement of Consumer Credit Regulation" (pages 301-418, Vol. 55, Northwestern University Law Review, No. 3; address: 357 East Chicago Avenue, Chicago 11, Illinois; price: $1.50).

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